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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

ACW AIRWALL, INC., *et al.*,
Petitioners,

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that 28 U.S.C. § 455 imposes a variable standard of judicial propriety which is defined by the size of the case, its location, and the judge's asserted need to continue the misconduct?

2. Whether the court of appeals erred in holding that a judge cannot become imbued with the ethical misconduct of his law clerks?

3. Whether the court of appeals misapplied the guidelines this Court set forth in *Liljeberg v. Health Services Acquisition Corp.* to deny petitioners a remedy?

RULE 29.1 LISTING

Petitioners are ACW Airwall, Inc., Dan River, Inc., Drexel Heritage Furnishings, Inc., Hufcor, Inc., Knoll International Holdings, Inc. (includes General Felt Industries and Scotfoam Corporation), and Wolf-Gordon, Inc. Drexel Heritage Furnishings, Inc. is a wholly owned subsidiary of MASCO Corporation, a publicly held company. None of the other petitioners has a parent or subsidiary with outstanding securities that are in the hands of the public.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners ACW Airwall, Inc., *et al.*, petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the First Circuit.[1]

OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit denying petitioners' petition for a writ of mandamus is reported at 891 F.2d 967 (1st Cir. 1989), and is reprinted at Pet. App. 1a. The order of the United States District Court for the District of Puerto Rico denying petitioners' Motion Requesting Recusal is unreported and is reprinted at Pet. App. 29a.

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[1] The majority of the petitioners before the First Circuit have since reached settlements with the plaintiffs and are therefore not petitioners in this Court.

JURISDICTION

The opinion of the court of appeals was entered on December 20, 1989. The petition for writ of *certiorari* is therefore due on March 20, 1990. This Court has jurisdiction to issue the requested writ under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves 28 U.S.C. § 455, which is reprinted in its entirety at Pet. App. 120a-122a.

STATEMENT OF THE CASE

Factual Background

This petition arises out of a large multidistrict case involving substantial claims for damages currently being tried in the United States District Court for the District of Puerto Rico before Judge Raymond L. Acosta. Petitioners are defendants in that proceeding.[2] At issue is Judge Acosta's decision knowingly to utilize, without disclosure to counsel for the defendants, two law clerks whose siblings and their law firms represent parties whose interests are adverse to the defendants.[3] Judge Acosta

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[2] The litigation has been divided into wholly separate, unrelated trials before separate juries. The Phase One trial—the so-called "Corporate Veil" trial—began on March 12, 1989 and ended on May 12, 1989, when the district court stayed further proceedings in light of a settlement reached by the plaintiffs and the hotel-related defendants. The jury in that case was dismissed on July 15, 1989. Jury selection in the current Phase Two trial—known as the "Products and Services" trial—lasted from June 27, 1989 through July 7, 1989. It is only this Phase Two trial that is at issue here. The future Phases of the proceeding—dealing with damages and comparative liability among the co-defendants—are anticipated to last at least one more year after the conclusion of the Phase Two trial.

[3] Judge Acosta's two law clerks, Richard Graffam and Vilma Vila, both have brothers who are partners in law firms representing parties in this case. William Graffam, brother of Richard Graffam, is a partner in the Puerto Rico law firm of Jimenez, Graffam &

delegated to these clerks responsibility for the day-to-day management of the case that far surpassed the typical duties of a law clerk. Indeed, far from performing merely ministerial functions or other tasks ordinarily assigned to law clerks, these clerks assumed substantial responsibility for the court's decisions, subject only to being "over ridden" by the judge,[4] and operated with the judge "on a team basis." Pet. App. 72a. In effect, unbeknownst to them, petitioners were engaged in a high-stakes proceeding in which the court's every decision was being actively fashioned in chambers by the siblings of their adversaries.

Although he knew about it "for a long time," Pet. App. 76a, Judge Acosta never disclosed to counsel that his clerks were siblings of petitioners' adversaries. In contrast, this set of facts remained unknown to petitioners. Affidavits submitted to both the district court and the court of appeals, and included in the appendices hereto, Pet. App. 80a-111a, show that counsel for at least 27 of the Phase Two defendants had no knowledge of the relationship at issue until July 20, 1989, or later.[5] Other counsel made clear at an August 7, 1989, hearing that they likewise had no knowledge of the clerks' conflicts of interest prior to that time. *See* Pet. App. 65a-79a.

Lausell. That firm represents at least 58 plaintiffs and has a partner who sits on the Plaintiffs' Steering Committee. William Graffam signed complaints on behalf of his firm's clients and has appeared at plaintiffs' counsel table during the Phase Two trial. Raul Vila, brother of Vilma Vila, is a partner in the Puerto Rico law firm of Fiddler, Gonzalez & Rodriguez, counsel of record for the San Juan Dupont Plaza Corporation.

[4] Transcript of Hearing in Chambers (Aug. 7, 1989), Pet. App. 65a, 72a.

[5] Only one affiant stated that he learned of Richard Graffam's conflict before July 20, namely on July 14, 1989, when William Graffam first appeared in court. He communicated his knowledge to his co-counsel from the mainland, but to no one else at that time. *See* Declaration of Arturo Diaz (Aug. 14, 1989), Pet. App. 110a.

When lawyers for the defendants learned of the clerks' relationships on July 20, 1989, they immediately took the steps necessary to enable them to respond responsibly to the information they had just learned. They: (i) sought to confirm that the information was accurate; (ii) reviewed the entire record of the proceeding to determine whether there had been prior disclosure, as none of the petitioners had been a participant in the proceeding since the outset; (iii) hired Special Counsel, an expert on ethical issues, for advice on the law relating to this matter; and (iv) consulted with clients and other defense counsel about the appropriate response to this new information.

Proceedings Below

Petitioners promptly raised their concerns with the district court on August 7, 1989, requesting an *in camera* meeting that was held later the same day. *See* Pet. App. 65a. On August 8, 1989, certain of petitioners filed under seal with the district court a Motion for a Recess and Stay of Proceedings, which the court summarily denied the following day. Pet. App. 64a. In accordance with the schedule set by the district court, on August 14, 1989, petitioners filed under a seal a Motion for Disqualification, Recusal and Mistrial. The motion was based on 28 U.S.C. § 455 and argued that the judge's undisclosed use of law clerks with sibling ties to petitioners' adversaries created an appearance of partiality that mandated recusal and mistrial.

Judge Acosta denied the motion on August 24, 1989. Pet. App. 29a. In contrast to a prior, unpublished ruling in which he found precisely the same kind of relationship—involving one of the very same clerks and his brother—as warranting recusal under Section 455,[6]

[6] Only four months before this case began, Judge Acosta was faced with a Section 455(a) recusal motion brought by a plaintiff represented by Harvey Nachman—lead counsel to plaintiffs—on

Judge Acosta this time labeled the sibling relationships as "not in themselves significant," Pet. App. 44a, and concluded that he "did not ever and still does not feel that" what he called "the tenuous connections drawn by defendants" "create a true appearance of partiality." Pet. App. 44a-45a. Far from denying his clerks' sibling relationships or his knowledge of them, he chastised petitioners for having failed to piece together earlier the undisclosed puzzle because, in the judge's view, "the road to [petitioners'] tentative and belated findings was full of arrows pointing in the right direction." Pet. App. 45a.

On August 30, 1989, petitioners filed a petition for a writ of mandamus in the United States Court of Appeals for the First Circuit. On December 20, 1989, following full briefing and oral argument, the court of appeals, per Judge Breyer, affirmed Judge Acosta's decision. Pet. App. 1a. The court of appeals conceded that if this were "an ordinary case," the legal question involved would "be a close one." Pet. App. 6a-7a. But the court of appeals fashioned a number of situational exceptions to excuse Judge Acosta from the "ordinary" application of the ethical rules set forth in 28 U.S.C. § 455. The First Circuit rejected the proposition that Section 455 sets forth a series of uniform ethical mandates to be even-handedly applied by all federal judges. It reasoned that

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grounds *identical* to those raised here: the involvement of Richard Graffam as Judge Acosta's law clerk in a case in which his brother, William Graffam, appeared as one of counsel for defendants. In an unreported decision issued September 10, 1986, Judge Acosta recused himself from all further participation in that proceeding, stating unequivocally and finding as a fact that the Graffam brothers' relationship "might lead to an appearance of impropriety in the eyes of a reasonable person." *Pan American Grain, Inc. v. M/V Freedom*, No. 84-1795 (D.P.R. Sept. 10, 1986), Pet. App. 116a, 118a. Petitioners first learned of Judge Acosta's unreported decision in *Pan American* after they filed their first mandamus petition, and then only in a chance conversation with a member of the Puerto Rican bar; neither Judge Acosta nor Mr. Nachman ever disclosed the existence of the case to petitioners.

the ethical obligations imposed by Section 455 depend on the size of the case, the size of the community in which the case is being tried, and the objectives served through violation of the rules.

Thus, the First Circuit engrafted onto Section 455 a number of ethical axioms that, in the court of appeals' view, spared the law clerks' relationships with counsel from triggering an appearance of partiality. For example, the court of appeals declared that "[o]ther things being equal, the more common a potentially biasing circumstance and the less easily avoidable it seems, the less that circumstance will appear to a knowledgeable observer as a sign of partiality." Pet. App. 8a-9a. Based on this precept, the court reasoned that the sibling relationships should be excused because, given the large size of the case and the relatively small Puerto Rican bar, a sibling relationship between law clerk and counsel would not be unexpected. Pet. App. 9a.

Similarly, the First Circuit reasoned that the judge's asserted need for the clerks overcomes "ordinary" Section 455 concerns because "the greater the extent to which the potentially disqualifying circumstance facilitates the just and efficient resolution of a case, the less likely a knowledgeable observer will consider it a sign of judicial partiality." Pet. App. 9a. Having engrafted these situational exceptions onto the clear provisions of Section 455, the First Circuit concluded that no violation of Section 455 occurred as a result of the judge's undisclosed use of the law clerks. Pet. App. 11a. This petition followed.[7]

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[7] In addition to these relationships, petitioners note that the district judge has maintained a long-standing, ongoing business relationship with one of counsel for defendants, Roberto J. Matos. Specifically, Judge Acosta and Mr. Matos appear to be involved in a business venture that is worth several hundred thousand dollars, employs the judge's wife and furnishes her with a salary and an automobile, and provides the judge and his wife with an annual income (believed to be $50,000) determined at a meeting attended by the judge, his wife, and Mr. Matos. Upon learning that peti-

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The decision below is fundamentally at odds with the standards of judicial ethics and conduct required of the federal judiciary by 28 U.S.C. § 455. Just two terms ago, in *Liljeberg v. Health Services Acquisition Corp.*,[8] this Court recognized that Section 455 plays a critical role in maintaining public confidence in the integrity and fairness of our judicial proceedings. Such confidence, the Court concluded, could be inspired only through the enforcement of objective standards of conduct that would in the first instance prevent and, if necessary, remedy situations where the partiality of a court could reasonably be questioned. This case presents precisely such a situation. There can be no doubt that the public would question the partiality of a proceeding in which the rulings of the court have been fashioned in chambers with the help of law clerks whose siblings stood to benefit directly from those rulings, and where those sibling relationships were not disclosed by the court to the parties who could be adversely affected by them.

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tioners had discovered this business relationship, Judge Acosta, on August 31, 1989, confirmed its existence. Pet. App. 27a. On September 7, 1989, petitioners filed a Motion for Additional Inquiry advising the district court of additional information that they had discovered concerning the business relationship and requesting that the court make the disclosure compelled by Section 455. On September 15, 1989, the court denied the motion and refused to provide any additional information. Pet. App. 20a. On September 29, 1989, petitioners filed a Motion for Recusal and Mistrial, which the judge denied less than one hour later. Pet. App. 19a. A second petition for mandamus was filed in the First Circuit on October 4, 1989. On the eve of oral argument, plaintiffs "settled their differences" with Mr. Matos' clients, Pet. App. 16a, thereby effectively removing Mr. Matos from the case. On this record, the court of appeals affirmed Judge Acosta's ruling. Pet. App. 14a.

[8] 486 U.S. 847 (1988).

What makes this case difficult—and very important—is that it puts to the test the federal judiciary's commitment to the enforcement of meaningful standards of judicial propriety. Ethical precepts are easy to forge in simple cases where little of consequence is involved. But, precisely because of the ease of enforcement, such pronouncements carry little practical weight. It is only the hard case—where the adherence to standards imposes significant costs—that truly defines the contours of judicial ethics and tests the rigor with which the judiciary will police itself to prevent appearances of partiality. This case poses that conflict, and presents that opportunity. The remedy sought here would unquestionably carry with it a real consequence. This is a complex case and starting over with a new judge would undoubtedly cause some inefficiencies. But, in the face of Congress' legislative declaration, that is the remedy required by Judge Acosta's conduct. Straining to avoid that result, the First Circuit has fashioned an approach to Section 455 that is fundamentally inconsistent with *Liljeberg* and the code of judicial responsibility and accountability the statute is designed to foster. If left uncorrected, the First Circuit's opinion will stand as a precedent for fashioning broad limitations on the applicability of Section 455 to conflicts of interest of judicial law clerks. It will also send an unmistakable signal to the judiciary, the bar, and the public that the code of ethics embodied in Section 455 melts in the heat of the hard case. Such a signal can do nothing but undermine the public's confidence in the integrity of our judicial process. Because the First Circuit's decision has so far departed from the accepted and usual course of judicial proceedings, it should not be allowed to stand.

I. THE COURT OF APPEALS HAS UNDERMINED SECTION 455 AND THIS COURT'S DECISION IN *LILJEBERG* BY CONCLUDING THAT JUDICIAL ETHICS ARE RULES OF CONVENIENCE AND NOT PRINCIPLE.

As this Court has long recognized, "'justice must satisfy the appearance of justice.'"[9] In 1974, Congress amended Section 455 of the Judicial Code to prescribe standards of judicial conduct to help achieve that objective. As amended, Section 455(a) requires a federal judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[10] In *Liljeberg v. Health Services Acquisition Corp.*,[11] this Court strongly endorsed and gave teeth to the provisions of Section 455. Recognizing that "people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges,"[12] the Court read Section 455 as imposing an objective set of uniform standards that require recusal "so long as the public might reasonably believe" that there is an appearance of partiality.[13]

Ignoring these teachings, the court of appeals concluded that Section 455 imposes no immutable standards of judicial conduct. Rather, the court decided that rules of judicial propriety can vary from case to case based on an analysis of three factors: the size of the case, its location, and the relationship between the challenged conduct and the judge's efficient disposition of the case. By reading Section 455 as embracing "situational ethics"—a notion nowhere found in the statute, *Liljeberg*, or the decisions

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[9] *In re Murchison*, 349 U.S. 133, 136 (1955) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

[10] 28 U.S.C. § 455(a).

[11] 486 U.S. 847 (1987).

[12] *Id.* at 864-65 (footnote omitted).

[13] *Id.* at 860.

of this Court or any other court—the court of appeals has seriously undermined both *Liljeberg* and the appearance of impartiality that Section 455 was intended to promote. The three factors relied on by the court of appeals are discussed in turn.

Size. Pervading the court of appeals' decision is the notion that the same standards that apply in other cases do not apply here because this case is "large, complex, and time consuming." Pet. App. 8a.[14] But that notion is supported neither by the statute nor *Liljeberg*. By its terms, Section 455(a) applies to "[*a*]*ny* justice, judge, or magistrate of the United States."[15] And as this Court noted in *Liljeberg*, the requirements of Section 455 apply "notwithstanding the size and complexity of the litigation."[16] The complexity of a case does not relieve a judge of his ethical responsibilities. To the contrary, complexity should serve only to heighten the judge's sensitivity to the potential conflicts of interest that he faces:

> Complex litigation often involves many parties and law firms, not all of whom may be known when a case is first filed. The judge to whom a complex case is assigned should check carefully, on a continuing basis as necessary, not only for existing problems of recusal or disqualification, but also for potential problems that may arise because of the joinder of additional parties, the assignment of other related cases,

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[14] In fact, the court of appeals' assumptions as to the size and complexity of this case are unfounded. The current Phase of the trial is being conducted in the name of 14 representative plaintiffs. It is conducted by the 12-member Plaintiffs' Steering Committee, only five or six of whom are typically present in the courtroom at one time. Many of the defendants, and indeed, the principal defendants, are jointly represented in various groups by a single law firm.

[15] 28 U.S.C. § 455(a) (emphasis added).

[16] 486 U.S. at 862 n.9.

> or the identification of class members. Reassignment, when warranted, should be accomplished as promptly as possible, and the judge to whom the litigation is to be reassigned should make a similar inquiry into problems of recusal or disqualification before notice is given of the reassignment.[17]

The First Circuit's suggestion that ethical imperatives are a function of case size is profoundly troubling. In the ethical realm envisioned by the First Circuit, judges would be held to a sliding scale of accountability. Only in the small, insignificant case would the standards of Section 455 be given full weight. Conduct that would warrant recusal in the small case would be excused if the case were large enough.[18] In this realm, entire categories of cases—MDL and class actions, to name but two—would be subject only to watered-down protections against judicial conflicts.

The First Circuit's approach rips Section 455 from its moorings. At its core, Section 455 is intended to assure continued public confidence in our judicial system by proscribing conduct that might call into question the impartiality of the proceedings. It beggars common sense to suppose that judicial conduct that would concern the public in the small, insignificant case would be of any less concern in complex cases where the stakes are larger. Indeed, if anything, the public is inherently more suspicious of the potential for partiality in large-stakes litigation, because it is precisely in those cases that the temptations for partiality are the greatest.

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[17] MANUAL FOR COMPLEX LITIGATION (SECOND) § 20.121, at 8 (1986) (footnotes omitted).

[18] A comparison between *Pan American*, *see* note 6 *supra*, and this case proves this point. The only conceivable distinction between *Pan American* and this case is that *Pan American* was a small case and this is a larger case.

It is not surprising, therefore, that the First Circuit's decision is at odds not only with *Liljeberg*, but with other circuit court decisions that have addressed the scope of Section 455 in the context of the large case. In *In re Cement Antitrust Litigation*,[19] for example, a multidistrict case decided before *Liljeberg*, after five years of litigation and after the plaintiff class had been certified, the district judge was notified that his wife owned a very small amount of stock in several members of the plaintiff class, and he promptly recused himself under 28 U.S.C. § 455(b)(4). Affirming that decision, the court of appeals noted that "after five years of litigation, a multi-million dollar lawsuit of major national importance, with over 200,000 class plaintiffs, grinds to a halt over Mrs. Muecke's $29.70. A new judge must now be assigned to conduct further proceedings." [20]

In sum, the "size" template that the First Circuit would impose on Section 455(a) is both wrong as a matter of policy and without precedent in the case law.

Location. A second, and equally troubling, gloss imposed by the First Circuit on Section 455 is the notion that the propriety of the conduct of a federal district judge can be diminished by reference to the perceived sensibilities of the community in which he sits. In this case, the First Circuit rationalized Judge Acosta's use of clerks with sibling relationships to counsel on the grounds that (a) it viewed the Puerto Rican bar as small, (b) the number of Puerto Rican lawyers involved in the case is large, and (c) in that court's view, a reasonable member of the Puerto Rican public would not be troubled by the

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[19] 688 F.2d 1297 (9th Cir. 1982), *aff'd sub nom. Arizona v. United States District Court for the District of Arizona*, 459 U.S. 1191 (1983).

[20] *Id.* at 1313.

temptations for partiality implicit in the use of the sibling clerks, even if precisely the same relationships would give pause in other locales. There is no authority, however, for the proposition that Section 455 sets different ethical standards depending on where a case may be located.[21] Regardless of how "common a potentially biasing circumstance and the less easily avoidable it seems," it simply does not follow that "the less that circumstance will appear to a knowledgeable observer as a sign of partiality." Pet. App. 8a-9a.

Ours is—and is viewed by the public as—a unified federal system. It is the public's expectation that this unified federal system will dispense justice in a uniformly evenhanded manner. A citizen's confidence in the integrity of the system would just as surely be undermined by perceived ethical abuses in a distant forum as it would be by comparable transgressions in his own backyard. Moreover, there is no rational basis for believing that people in different states or territories of the country hold different views as to the propriety of judicial conduct or, more specifically, that people in Puerto Rico are more tolerant of judges' ethical lapses.

Nor can there be any serious dispute that Section 455, as interpreted in *Liljeberg*, applies the same way to every federal jurisdiction. In other matters dealing with the ethical obligations of attorneys and judges, Puerto Rico is no different from other federal jurisdictions, large or small. For example, like most other federal jurisdictions, Puerto Rico has adopted the Model Rules of Professional Conduct for attorneys, and it applies the same Code of Judicial Conduct as all other federal courts. Puerto Rico is not a particularly small jurisdiction; it is virtually at

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[21] Indeed, in the *Pan American* case, Judge Acosta did not find that the size of the Puerto Rican bar or the situs of the case created any basis for different ethical standards. *See* Pet. App. 117a-118a.

the median.[22] In short, the court of appeals' approach would destroy the ethical requirements of a large part of the United States.[23]

Like the court of appeals' "size" test, its "location" standard creates a pernicious precedent. In effect, what the First Circuit has done is to strip Section 455 of any meaning as a coherent body of national ethical rules that are to be applied evenhandedly to all federal judges. In the First Circuit's view, the parameters of acceptable judicial conduct are set, not by the proscriptions of Section 455, but rather by a judge's own perception of the mores of the community in which he sits. Liberated from any controlling uniform standard, federal judges in each district or circuit would be free to develop their own standards of conduct based on their own, largely unreviewable, findings of the local community's tolerance for the conduct that has been put at issue. A federal appellate judge whose jurisdiction straddled both large and small states would be able to alter his ethical standards depending on which state was involved in the particular case before him. A federal judiciary cannot hope

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[22] Puerto Rico is larger in population than 24 states and the District of Columbia. Those 24 states are: Alaska, Arkansas, Colorado, Connecticut, Delaware, Hawaii, Idaho, Iowa, Kansas, Maine, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oregon, Rhode Island, South Dakota, Utah, Vermont, West Virginia, and Wyoming. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 18 (109th ed. 1989) (1986 figures).

[23] Even accepting the notion that Puerto Rico is among the smaller legal communities in the country, the First Circuit never deals with the obvious alternative of assigning a judge, or law clerks, from another district if there are no judges or clerks in the District of Puerto Rico without conflicts of interest. Indeed, the Judicial Code specifically provides for the assignment of other judges under circumstances such as these. *See* 28 U.S.C. § 292. Plenty of judges were available, from both Puerto Rico and the mainland, to decide this case if Judge Acosta recused himself. Surely this is more consistent with the ethical precepts of Section 455 than the First Circuit's "small community" standard.

to maintain the confidence of the public if its ethical foundations are built on such shifting sand.

Need. Nor is there any authority, or record support, for the court of appeals' holding that recusal is not required because Judge Acosta needed these clerks in order to resolve the case. In the First Circuit's view, the strictures of Section 455 and *Liljeberg* vary according to the judge's subjective need to engage in the impropriety to facilitate the proceedings, and the parameters of propriety are to be defined by "the extent to which the potentially disqualifying circumstance facilitates the just and efficient resolution of a case." Pet. App. 9a. In other words, if otherwise impermissible conduct is a means to a desirable end (*e.g.*, efficient disposition of a case), the dictates of Section 455 are not violated. No legitimate system of ethics can endure on that basis. Under the First Circuit's test, the scope of Section 455 would be dictated by an assessment of the desirability of the judge's stated objectives, not the means by which he attempted to achieve that end. That approach would turn Section 455 on its head. Moreover, the First Circuit's test has nothing to do with the likelihood that "a knowledgeable observer will consider it a sign of judicial partiality." Pet. App. 9a. Neither objective observers nor participants in the case can have any idea of the extent to which an ethical lapse may assist the judge in resolving a case.

In short, each of the sliding scales invented by the court of appeals—size, location, and need—seriously contravenes Congress' directive in Section 455 and this Court's ruling in *Liljeberg* by providing ways to circumvent their explicit requirements. Absent guidance from this Court, the court of appeals' decision, by being the first decision to deliberately skirt these ethical imperatives, has set the precedent for other federal courts to ignore the statute and the teachings of *Liljeberg* even further.

II. THE COURT SHOULD GRANT *CERTIORARI* TO REVERSE THE FIRST CIRCUIT'S ERRONEOUS APPLICATION OF SECTION 455 TO LAW CLERKS.

This Court has never addressed the important question of how the relationships and conduct of judicial law clerks affect the application of Section 455 to the judges for whom they work. In its opinion below, the First Circuit has seriously diluted the application of Section 455 to potential conflicts of interest on the part of law clerks. Given the importance and visibility of law clerks in our federal system, and the concomitant potential for conflicts of interest on their part, the Court should grant *certiorari* to correct the error of the First Circuit and to provide meaningful guidance to federal judges and their clerks.

As the facts of this case make clear, it is not only the judge whose actions may create an appearance of judicial partiality. The judge's law clerks may, by dint of their own sets of relationships or conduct, also create an appearance of partiality that outsiders may perceive as tainting the impartiality of judicial proceedings. Law clerks enjoy a uniquely close relationship with the judges for whom they work, affording them special access to the court's deliberative processes. Because of "the close association that usually exists between the judge and the clerk," "[t]he clerk's actions, both professional and personal, reflect upon the esteem in which the judiciary is held." [24] As one court of appeals has aptly noted:

> Law clerks are not merely the judge's errand runners. They are sounding boards for tentative opinions and legal researchers who seek the authorities that affect decision. Clerks are privy to the judge's thoughts in a way that neither parties to the lawsuit nor his most intimate family members may be.[25]

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[24] A.M. DILEO & A.B. RUBIN, LAW CLERK HANDBOOK § 2.110, at 25 (1977).

[25] *Hall v. Small Business Admin.*, 695 F.2d 175, 179 (5th Cir. 1983).

Because law clerks' actions reflect on the integrity of the judicial process itself, law clerks are subject to the same rigorous ethical standards as the judges for whom they work. The Code of Judicial Conduct expressly states that "[a] judge should require his staff and court officials subject to his direction and control to observe the standards of fidelity and diligence that apply to him." [26] Similarly, the Code of Conduct for Law Clerks makes clear that a law clerk "should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary and of his office." [27] Thus, although Section 455 by its terms applies to judges, in practical effect it applies to law clerks as well.

Although law clerks unquestionably are important to the judicial system, they alone do not keep the system functioning, and, contrary to the apparent view of the court below, their conflicts of interest need not present insoluble problems. This is not a case calling for the application of the so-called "Rule of Necessity," *see* Pet. App. 9a, the rule that " 'although a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may but must do so if the case cannot be heard otherwise.' " [28]

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[26] CODE OF JUDICIAL CONDUCT Canon 3B(2). The LAW CLERK HANDBOOK states that although the Code, by its terms, applies to judges only, it "furnishes guidance" on law clerks' ethical questions, and "serves as a model for standards of conduct required of all employees and officials of the judicial branch." A.M. DILEO & A.B. RUBIN, *supra* note 24, § 2.120, at 26. Indeed, by analogizing to the Code of Judicial Conduct, the Advisory Committee on Judicial Activities of the Committee on Codes of Conduct has advised that a law clerk may not work on cases in which his spouse's firm represents a party. Advisory Opinion No. 51 (Aug. 15, 1977).

[27] GUIDE TO JUDICIARY POLICIES AND PROCEDURES, vol. I, ch. X, Canon 3A (Dec. 1988).

[28] *United States v. Will*, 449 U.S. 200, 213 (1980) (quoting F. POLLACK, A FIRST BOOK OF JURISPRUDENCE 270 (6th Cir. 1929)).

This case does not involve a situation such as a judge's need to decide a tax question that would affect not only him but all federal judges, to use the court of appeals' example, Pet. App. 9a; nor does this case involve a judge's need to decide the constitutionality of pay raises for the entire federal judiciary, as in *Will*.

Here, a simple and practical alternative was available to Judge Acosta to avoid the conflicts and to comply with the statute and *Liljeberg*. He could have walled off the clerks from participation in the case at the very outset—as he did in *Pan American*. He easily could have hired other experienced "career clerks," Pet. App. 9a—from either Puerto Rico, the Virgin Islands, or the mainland—who had no siblings involved as counsel, or even practicing law at the federal bar in Puerto Rico, and who could work exclusively on the case. At the very least, Judge Acosta should have disclosed the law clerks' relationships on the record at the beginning of the case.

The fact that Judge Acosta did not avail himself of any of these practical alternatives—but instead continued, without disclosure, to use the law clerks with the offending relationships—presented the First Circuit with a dilemma. To acknowledge the accountability of Judge Acosta for the relationships of his law clerks would have forced the First Circuit to confront a remedy it clearly had, but perhaps, understandably, wanted to avoid. Instead, the First Circuit avoided the dilemma by effectively reading law clerk relationships out of Section 455. In so doing, the First Circuit has articulated a standard of ethics and accountability that will, if uncorrected, threaten the public's perception of the impartiality of judicial proceedings. It is self-evident that the average citizen would not want to face trial before a judge whose law clerks were siblings of his adversaries' counsel. We suggest that it would be impossible to persuade that citizen that the trial was free of the potential for partiality. In an effort to avoid a difficult result, the First Circuit

blinked at this reality. But it is precisely the perspective of the average citizen to which Section 455(a) is sensitive, and which serves as the benchmark for its application. By ignoring this, the First Circuit has articulated a rule as to law clerks that undermines one of the statute's central purposes. It is essential that the Court correct that error and make clear to federal court judges that they are accountable under Section 455 for the relationships of their law clerks.

III. *CERTIORARI* IS WARRANTED BECAUSE THE COURT OF APPEALS CLEARLY MISAPPLIED THE GUIDELINES SET FORTH IN *LILJEBERG* TO DENY PETITIONERS A REMEDY.

Certiorari is also necessary here because the court of appeals distorted the guidelines this Court set forth in *Liljeberg* for shaping remedies for violations of Section 455. In *Liljeberg*, the Court articulated a three-part test:

> We conclude that in determining whether a judgment should be vacated for a violation of § 455(a), it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process. We must continuously bear in mind that "to perform its high function in the best way 'justice must satisfy the appearance of justice.'" [29]

Straining to avoid disrupting a large, ongoing proceeding, the court below clearly misapplied each of those three factors.[30]

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[29] 486 U.S. at 864 (citation omitted).

[30] Even though the court below found no violation of Section 455, it alternatively ruled that "[w]ere our conclusion about the appearance of partiality different, the factors that the Supreme Court mentions, as applied to the case before us, would nonetheless prevent us from setting aside any previous judicial action." Pet. App. 12a.

Risk of Injustice to the Parties. The court concluded that "[r]etrying Phase Two would create a significant risk of injustice to the parties, in that doing so would mean considerable repetition." Pet. App. 12a. That conclusion is wrong on the facts and ignores the real problem that Section 455 is designed to solve. "[C]onsiderable repetition" would not result here because neither the settlement of the Phase One trial nor the continuation of the Phase Two trial would be seriously affected by the remedy petitioners seek. Petitioners were not parties to the agreement settling the Phase One trial and have no standing or desire to overturn it. In any event, the plaintiffs and the hotel defendants that entered into the agreement ending Phase One apparently were well aware of the judge's ethical conflicts at that time,[31] and therefore cannot be heard to challenge that agreement now. As to the effect of the requested remedy on the Phase Two trial, petitioners' requested relief was limited to replacing Judge Acosta in that trial—which had only just begun at the time petitioners filed their motion for recusal—and starting the Phase Two trial anew or proceeding with the trial from there.

More fundamentally, however, the court of appeals did not give proper weight to the Section 455 violation at issue here in rushing to the conclusion that the repetition of several weeks of trial would amount to an "injustice." It is fundamentally unfair to require a litigant to abide by the result of a proceeding that has been infected with an appearance of partiality. The notion—apparently subscribed to by the First Circuit—that a greater injustice would be caused by ordering a retrial is quite simply wrong. Indeed, in *Liljeberg* this Court affirmed an opinion that vacated a ten-month-old judgment. The remedy sought here is much more limited: declaration of a mistrial and replacement of the judge

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[31] *See* Sworn Statement of Charles A. Cordero, Pet. App. 112a; Declaration of Gary L. Bostwick, Pet. App. 114a.

in an ongoing proceeding projected to last at least another year.

Risk of Injustice in Other Cases. The court of appeals' disposition of the second criterion is equally erroneous. The court concluded that denying the requested remedy in this case would not produce injustice in other cases because petitioners "have not pointed to any specific findings or rulings already made in the Phase Two litigation that are incurable or could have preclusive effect in some other action," Pet. App. 13a, and because "[t]he petitioners have not alleged that actual bias has infected any findings or rulings," Pet. App. 13a.[32] The First Circuit's analysis here is completely at odds with the teachings of *Liljeberg* as to "the risk of injustice in other cases." What this Court explained in *Liljeberg* applies equally here:

> [P]roviding relief in cases such as this will not produce injustice in other cases; to the contrary, the Court of Appeals' willingness to enforce § 455 may prevent a substantive injustice in some future case by encouraging a judge or litigant to more carefully examine possible grounds for disqualification and to promptly disclose them when discovered.[33]

In this case, Judge Acosta was fully aware of his ethical violation from the outset of the proceeding. Indeed, in *Pan American*, he had recused himself under Section

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[32] By its terms, the statute requires a judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." This language was intended "to broaden and clarify the grounds for judicial disqualification," H.R. REP. No. 1453, 93d Cong., 2d Sess. 1 (1974); *see also* S. REP. No. 419, 93d Cong., 1st Sess. 1 (1973), by extending recusal well beyond those situations where actual bias or prejudice could be shown to exist. To be sure, if a judge is in fact biased against one of the parties, he must recuse himself under the statute. But the statute does not say that a judge is required to disqualify himself *only* in a proceeding in which he is actually partial to one of the parties.

[33] 486 U.S. at 868.

455 based on the same law clerk family relationship. Judge Acosta nonetheless failed to disclose the conflict of interest to the parties, or seek a waiver from the parties as provided for in the statute. The First Circuit's decision ignores the fact that condoning such a knowing violation tells other judges in similar situations that they too may engage in improper conduct.

Risk of Undermining Public Confidence in the Judicial Process. The court of appeals dismissed the third criterion without any analysis, simply stating that "for reasons set forth earlier, . . . we would not believe (even were the 'appearance of partiality' line drawn differently) that the relevant public's confidence in the judiciary would be seriously undermined were no mistrial declared." Pet. App. 13a. If a reasonable, objective observer would find a judge's knowing, undisclosed countenancing of his law clerks' conflicts of interest sufficient to raise questions concerning his partiality, surely that same reasonable person's confidence in the judicial system would be undermined if the judge were allowed to continue to preside.[34]

The court of appeals' misapplication of the remedy test set forth in *Liljeberg* not only denies a remedy in this case; more fundamentally, it tells other federal courts that *Liljeberg* may be applied to favor administrative convenience over the maintenance of an appearance of impartiality. Such a precedent eviscerates Section 455 and erodes this Court's decision in *Liljeberg*.

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[34] The court of appeals also erred in concluding that "few equitable considerations favor the parties who have brought this petition," Pet. App. 13a, on the ground that all of petitioners' counsel did not produce affidavits attesting that they had no knowledge of the law clerks' conflicts of interest. Aside from the fact that Section 455, unlike 28 U.S.C. § 144, does not require the submission of such affidavits, the court of appeals' suggestion that other counsel may have known of the conflict and that all of those who were unaware should be penalized for not discovering the relationship, wholly ignores the fact that it was Judge Acosta, not counsel for petitioners, who deliberately concealed the facts in this case.

CONCLUSION

For the foregoing reasons, this Court should grant the writ of *certiorari*.

Respectfully submitted,

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March 20, 1990

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 89-1823

IN RE: ALLIED-SIGNAL INC., *et al*,
Petitioners.

ON PETITION FOR WRIT OF MANDAMUS

December 20, 1989

Before

Campbell, *Chief Judge*,
Timbers,* *Senior Circuit Judge*, and
Breyer, *Circuit Judge*

Geoffrey C. Hazard, Jr., with whom *Stephen H. Sachs, Andrew B. Weissman, Alan N. Braverman, Joseph E. Killory, Jr., Teresa D. Baer* and *Wilmer, Cutler & Pickering*, were on brief for petitioners.

Arthur R. Miller, with whom *Sherrill Hondorf, Waite, Schneider, Bayless & Chesley, Peter Berkowitz, Alvaro Calderon, Stanley M. Chesley, John Cummings, III, Wendell H. Gauthier, David C. Indiano, Will Kemp, Harvey B. Nachman, Jorge Ortiz Brunet, Jorge M. Suro-Ballester* and *Francisco M. Troncoso*, were on brief for respondents, The Plaintiffs' Steering Committee.

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* Of the Second Circuit, sitting by designation.

BREYER, *Circuit Judge.* A group of defendants, currently engaged in a highly complex mass tort litigation, have filed a mandamus petition asking us to disqualify the judge and to declare a mistrial because two of the judge's law clerks have brothers who represent plaintiffs. After reviewing the special circumstances of this litigation, we conclude that it would not be proper for us to provide the relief these defendants seek. We therefore deny the defendants' petition for mandamus.

I.

Background

On New Year's Eve 1986 a fire in the San Juan Dupont Plaza Hotel in San Juan, Puerto Rico killed 97 people and injured several hundred others. Within a few months over 2,300 plaintiffs filed numerous actions seeking a total of about $1.8 billion from more than 200 defendants. The Judicial Panel for Multidistrict Litigation transferred these related cases from all over the United States to San Juan, Puerto Rico, where Judge Raymond Acosta has since managed, and brought to trial, what the trade press has described as "the nation's largest mass disaster litigation."

Judge Acosta has played an active role in trying to obtain a resolution of the litigation. He developed and promulgated a 252-page case management order. He imposed and enforced strict discovery deadlines. He appointed a Plaintiffs' Steering Committee. At his request the Chief Justice of the United States appointed U.S. District Court Judge Louis C. Bechtle of Philadelphia a "settlement judge," permitting the parties to try to settle their claims before that judge while they simultaneously prepared for trial in Judge Acosta's court.

Judge Acosta's management orders provided for several separate trials, each dealing with different issues common to many of the individual cases. A "Phase One"

trial permitted the plaintiffs to litigate against the hotel's many corporate owners (and related insurers) to determine whether the plaintiffs could "pierce the corporate veil" of the corporation that directly owned the hotel (and had little insurance) in order to make more distant (and ultimate) owners liable. In the "Phase Two" trial now before us, the plaintiffs are litigating against manufacturers of products used in the hotel and the providers of services to the hotel, claiming that defects in those products and services led to unnecessary death and injury. Trials of later phases will involve apportionment of negligence, various cross-claims and third party complaints, and ultimately the hotel's racketeering claim against the Teamsters Union, whose members, the hotel says, set the fire.

After about two years of pretrial proceedings that involved the collection and storage of more than 3,000,000 documents, the taking of 2,200 depositions, 200 pretrial orders, 500 "margin orders," 12,000 docket entries, and the construction of a specially designed courtroom, the consolidated cases were ready for the Phase One "corporate veil" trial. It began on March 12, 1989. Within two months the hotel defendants and the plaintiffs, negotiating in Philadelphia, reached a settlement, calling for the hotel defendants to pay about $85 million, approximately 35% of the $248 million "global value" that Judge Bechtle said he would place upon the claims against them. On May 12, 1989, Judge Acosta stayed the Phase One trial in light of the settlement.

Judge Acosta then proceeded to the Phase Two "suppliers" trial (against 90 of the hotel's product and service suppliers); on June 27, 1989, jury selection in that trial began. Six weeks later, after opening arguments and the beginning of the trial, 40 of 78 remaining Phase Two defendants asked Judge Acosta to recuse himself and to declare a mistrial. They pointed out that one of the judge's law clerks who was working on the case, Richard

Graffam, has a brother William who is a named partner in a San Juan law firm that represents 58 of the 2,300 plaintiffs; that one of the members of that firm (David Indiano) is a member of the Plaintiffs' Steering Committee; and that William himself had appeared at the counsel table twice during the Phase Two trial. They also pointed out that another clerk who was working on the case, Vilma Vila, has a brother Raul who is a member of a law firm that represents the hotel corporation, a corporation which, like the plaintiffs, has an interest in finding the suppliers liable for some of the damages. (The Phase One settlement agreement explicitly provides that the $85 million payable by the hotel defendants will be reduced by 50% of the amounts plaintiffs receive from other defendants, up to a total reduction of $7 million.) They argued that, in light of these relationships, Judge Acosta's "impartiality might reasonably be questioned," 28 U.S.C. § 455(a); hence, the law required him to "disqualify himself." *Id.*

Judge Acosta denied the defendants' motions. The forty defendants (joined by several others) now ask us to issue a writ of mandamus requiring Judge Acosta to declare a mistrial in Phase Two and to disqualify himself from further participation. *See In re United States*, 666 F.2d 690, 694 (1st Cir. 1981) ("the issue of judicial disqualification presents an extraordinary situation suitable for the exercise of our mandamus jurisdiction"). *But see id.* at 695 ("the party seeking the writ of mandamus must show a 'clear and indisputable' right to relief") (quoting *Kerr* v. *United States District Court*, 426 U.S. 394, 403 (1976)); *In re Union Leader Corp.*, 292 F.2d 381, 383 (1st Cir.) (holding that mandamus is a power to be exercised sparingly, and should be resorted to only in extreme cases), *cert. denied*, 368 U.S. 927 (1961). We have reviewed the record and Judge Acosta's opinion accompanying his denial of the defendants' motions. In our view, Judge

Acosta's decision falls within the bounds of the discretionary authority which the law provides him. We therefore deny the mandamus petition.

II.

The Relevant Law

The relevant statute, 28 U.S.C. § 455(a), says:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. § 455(a). We draw our legal standards for review of a district judge's decision not to disqualify himself from an analogous case, *In re United States*, 666 F.2d at 690. We there held (1) that "a charge of partiality must be supported by a *factual basis*," (2) that "disqualification is appropriate only if the facts provide what an objective, knowledgeable member of the public would find to be a *reasonable basis* for doubting the judge's impartiality," and (3) that this court of appeals will allow the district judge "a range of discretion" in making these determinations. *Id.* at 695 (emphasis in original). Only if the district court's decision to sit "*cannot be defended as a rational conclusion supported by reasonable reading of the record*" will we insist upon disqualification. *Id.* (emphasis added). *See United States* v. *Giorgi*, 840 F.2d 1022, 1034 (1st Cir. 1988) ("The decision to grant or to deny a motion for disqualification is committed largely to the discretion of the trial court, and we review it solely to evaluate whether the decision below amounted to an abuse of discretion."). We also said that, when considering disqualification, the district court is *not* to use the standard of "Caesar's wife," the standard of mere suspicion. *In re United States*, 666 F.2d at 695 n.*. That is because the disqualification decision must reflect *not only* the need to secure public confidence through proceedings that appear

impartial, *but also* the need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking. *See, e.g., In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988) ("A judge is as much obliged not to recuse himself when it is not called for as he is obliged to when it is."), *cert. denied sub. nom. Milken* v. *SEC*, 109 S. Ct. 2458 (1989); *In re United States*, 666 F.2d at 694; *United States* v. *Bray*, 546 F.2d 851, 857 (10th Cir. 1976); *Alvarado Morales* v. *Digital Equipment Corp.*, 699 F. Supp. 16, 19 (D.P.R. 1988) ("[I]t has been wisely observed that each judge must be alert to avoid the possibility that those who would question his impartiality are in reality seeking to avoid the consequences of his expected adverse decision . . . ."); H.R. Rep. No. 1453, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 6351, 6355 ("Litigants ought not to have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice."). Even though § 455 was intended to do away with the formal "duty to sit" doctrine, *see Blizard* v. *Frechette*, 601 F.2d 1217, 1220 (1st Cir. 1979); H.R. Rep. No. 1453, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 6351, 6355, the judge must still tread cautiously, recognizing on the one hand, the great importance to the judicial institution of avoiding any appearance of partiality, while simultaneously remaining aware of the potential injustices that may arise out of unwarranted disqualification.

III.

The Law Applied

Given these standards, the district court's determination, and the record before us, we cannot find the district court's decision unlawful. Were this an ordinary case, involving a law clerk whose brother (or whose

brother's firm) represents a party, the legal question of whether a judge must disqualify himself would at least be a close one. On the one hand, the relationship at issue, "brother of a clerk," is a close relationship; that relationship itself creates a fairly close relation between clerk and party, at least where the brother himself (and not simply someone else in a large firm) represents a party in court; and the relationship of clerk to judge itself is close enough that one might find an appearance of undue influence. *See, e.g., Parker* v. *Connors Steel Co.*, 855 F.2d 1510, 1525 (11th Cir. 1988) ("We recognize the importance that some law clerks play in the decisional process and it is for this reason that a '"clerk is forbidden to do all that is prohibited to the Judge."'") (quoting *Hunt* v. *American Bank & Trust Co.*, 783 F.2d 1011, 1015 (11th Cir. 1986) (quoting *Hall* v. *Small Business Administration*, 695 F.2d 175, 179 (5th Cir. 1983))), *cert. denied*, 109 S. Ct. 2066 (1989). Ordinarily, it would not be difficult for a judge to assign some other clerk to work on the case; and, ordinarily, if a clerk were needed and no clerk of impartial appearance were available, a judge might be able to recuse himself with no great inconvenience or risk of injustice to the parties. Indeed, Judge Acosta himself has previously done so. *See* Opinion and Order of September 10, 1986, *Pan American Grain, Inc.* v. *M/V Freedom*, Civil No. 84-1795 (D.P.R.) (per Acosta, J.) (granting recusal motion under 28 U.S.C. § 455(a) when former law clerk and brother of only available current law clerk were both counsel for plaintiff).

On the other hand, the conflict is relatively weak and remote. Assuming the family relationship raises a slight cloud, few knowledgeable people would expect that it would ordinarily cause most law clerks to actually commit the serious ethical breach of seeking to influence a judge improperly. Both bench and bar recognize, moreover, that judges, not law clerks, make the decisions. The statute itself speaks of "justice[s], judge[s],

or magistrate[s]," not clerks. *See* 28 U.S.C. § 455(a). And judges are fully capable (and believed by reasonable members of the public to be fully capable) of taking account of whatever "bias" having a brother in a plaintiff's law firm might bring to a clerk. Furthermore, individual judges must enjoy considerable independence in deciding precisely how to use their law clerks, for "bureaucratizing" the law clerk system with too many rules and regulations or too much appellate court supervision would threaten the flexibility that permits that system to speed the resolution of cases. At the same time, it is not necessarily easy, from an administrative perspective, for a judge to find and to deal in advance with all "suspect" relationships of staff and parties, particularly in a legal world where "the country's 25 biggest law firms together now employ more than 10,000 lawyers." New York Times, November 22, 1989, at A22, col. 4.

The case before us, moreover, is not an ordinary case. It is large, complex, and time consuming: it involves hundreds of lawyers, thousands of parties, and hundreds of millions of dollars in potential damages. It is a case where the need for judicial management by the district court counsels caution prior to intervention by an appellate court. And it is a case of a sort that the Supreme Court has singled out for somewhat special treatment. *See Liljeberg* v. *Health Services Acquisition Corp.*, 108 S. Ct. 2194, 2203 n.9 (1988). These special features fortify our conclusion that the law requires neither disqualification nor mistrial, for two separate, independent sets of reasons.

1. *Section 455's Appearance of Impartiality.* In addition to the general factors already mentioned, three special features of this case militate against our finding an appearance of partiality that requires disqualification. First, other things being equal, the more common a potentially biasing circumstance and the less easily avoidable it seems, the less that circumstance will appear to a

knowledgeable observer as a sign of partiality. If only a handful of judges paid federal income tax, for example, one might wonder about the appearance of one such judge deciding a tax case that could produce lower rates; when nearly all judges pay taxes, the appearance does not seem significant. Similarly, in this case, the federal bar in Puerto Rico is small; fewer than 500 lawyers practice in the federal district court. The number of Puerto Rican lawyers involved in this case is large: 51 Puerto Rican law firms (including 12 of the largest 20) represent defendants; at least 48 Puerto Rican lawyers represent plaintiffs. The risk that a law clerk, or some other staff member, will have a brother or sister or some other family member involved in this case is a likely concomitant of trying such a large case in such a small district. We do not say that the relationship is unavoidable; we simply say that it arises out of a common circumstance. And, a knowledgeable objective observer is therefore more likely to see the relation as implicit in the special circumstances rather than as an odd coincidence the failure to avoid which might suggest bias.

Second, other things being equal, the greater the extent to which the potentially disqualifying circumstance facilitates the just and efficient resolution of a case, the less likely a knowledgeable observer will consider it a sign of judicial partiality. In this case, the effective management of this highly complex litigation benefited from, if it did not absolutely require, the services of the particular law clerks in question. Graffam and Vila are not law clerks hired fresh from law school. Rather, they are career clerks who were already working for Judge Acosta when the hotel litigation began in January of 1987. The record suggests that their experience and participation were highly useful in bringing Phase One to trial, smoothly, and with unusual speed. In other words, the court's need for the clerks was somewhat special and likely to have been seen as such.

Third, the parties' own words and deeds may help determine the extent to which a knowledgeable observer would see, in a particular circumstance, a sign of partiality. Here, the record suggests that the district court reasonably believed that the parties, certainly by the time of the Phase Two trial, were aware, or should have been aware, of the relationships involved. The law clerks were present at nearly all discovery conferences and every day at trial; the press identified them by name, and carried a picture of Richard Graffam together with Judge Acosta; they participated actively in many of the proceedings; during the Phase One jury selection, Richard Graffam's name and Vilma Vila's name were mentioned to the jury several times each day. The Puerto Rican legal community, particularly the federal bar, is small enough for active members to know each other, at least by reputation; there is apparently only one Graffam family in Puerto Rico; William Graffam is a prominent lawyer whose name has appeared often on documents associated with this case; indeed, one lawyer for defendants says in a recusal affidavit that he knew that Richard and William Graffam were related before the beginning of the hotel litigation. Yet, for more than two years during which Richard Graffam and Vilma Vila participated in the proceedings, no one objected. This fact suggests that, until recently, those associated with the case did not see the "sibling relationship" as carrying with it a threat to the impartiality of the proceedings; and that fact helps to support the district court's conclusion that a "knowledgeable" objective observer would not have seen in the relationship a significant indication of partiality.

These special features of this case make it readily distinguishable from *Parker* v. *Connors Steel Co.*, 855 F.2d at 1510 (finding an appearance of partiality under § 455(a) where the district judge's law clerk's father was a partner in a law firm that represented one of the parties, the law clerk's father himself was a former law

clerk to the judge, the law clerk had presided at a hearing in the judge's absence, and the district judge would specifically give credit to the law clerk in the opinions he authored, but concluding that the judge's denial of a recusal motion was harmless error). The special features, together with the general considerations that we mentioned above, *see* pp. [6a-8a], *supra*, lead us to conclude that Judge Acosta's determination that an objective, knowledgeable observer would not have "a reasonable basis for doubting the judge's impartiality" falls within the "range of discretion" that the law allows him. *In re United States*, 666 U.S. at 695.

2. *The Proper Remedy.* Even if we reached the opposite conclusion about the appearance of partiality, we should still deny defendants' mandamus petition for reasons related to remedy. The petition asks for certain relief that is related to the past, namely the declaration of a mistrial; it also asks for certain relief that is related to the future, namely an order requiring disqualification. As to the future, the appropriate order from this court would require Judge Acosta to proceed without the clerks, not to disqualify himself. "If a clerk has a possible conflict of interest, it is the clerk, not the judge, who must be disqualified." *Hunt* v. *American Bank & Trust Co.*, 783 F.2d 1011, 1016 (11th Cir. 1986).

We shall not now insist, however, that Judge Acosta disqualify his clerks for the future, for proper management of this enormously complex case is of great importance, we are uncertain about the extent to which these particular clerks are needed at this stage of the proceedings, and we would not risk disruption without such knowledge. We note, however, that one of the circumstances we relied upon in our discussion of impartiality—the absence of objection by the parties—can no longer be said to characterize the situation. We therefore point out to Judge Acosta that he may wish to reconsider the continued use of clerks with a "sibling relationship."

As to relief for the past, the Supreme Court has said, in respect to judicial actions already taken, that the disqualification statute, 28 U.S.C. § 455, "neither prescribes nor prohibits any particular remedy for a violation of" the duty that statute imposes. *Liljeberg*, 108 S. Ct. at 2203. It has added that "in determining whether a judgment should be vacated for a violation of § 455, it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process." *Id.* at 2204. Although the Supreme Court made this statement in the context of a motion under Fed. R. Civ. P. 60(b), we believe it should apply as well to present circumstances, where "mistrial" or retroactive "disqualification" would threaten to undo matters of considerable importance previously decided.

Were our conclusion about the appearance of partiality different, the factors that the Supreme Court mentions, as applied to the case before us, would nonetheless prevent us from setting aside any previous judicial action. Retrying Phase Two would create a significant risk of injustice to the parties, in that doing so would mean considerable repetition. By September 14, 1989, second phase preparation and trial had involved the entry of 2,210 items on the docket, the admission of 699 exhibits, the issuance of 143 orders, and the examination of 57 witnesses. Moreover, interrelationships between the different phases of the case and between settlement procedures and trial, the care with which the pretrial orders, the discovery, and the trial preparations have been crafted and organized, and the way in which those orders have been meticulously enforced, lead us to fear that retrial could mean, not only the unfairness inherent in the loss of time and money, but also the greater injustice inherent in putting the settlement agreements at risk.

Nor do we believe that denial of the particular retrospective relief requested would produce injustice in other cases. The petitioners have not alleged that actual bias has infected any findings or rulings. They have not pointed to any specific findings or rulings already made in the Phase Two litigation that are incurable or could have preclusive effect in some other action.

Further, for reasons set forth earlier, *see* pp. [6a-11a], *supra*, we would not believe (even were the "appearance of partiality" line drawn differently) that the relevant public's confidence in the judiciary would be seriously undermined were no mistrial declared.

Finally, few equitable considerations favor the parties who have brought this petition. All but one of the 49 petitioners are represented by local counsel, yet only 6 local counsel, representing 24 of the petitioning defendants, have produced sworn statements that they did not know of the "sibling relationships" until after the Phase Two trial began. (Of course, some "stateside" counsel have produced such statements, which is pretty much beside the point.) Given the opportunities for the parties now before us to learn of this "relationship," and to ask Judge Acosta to find new clerks well before the present trial, we cannot find many considerations of justice that argue for declaration of a mistrial.

In sum, the remedial considerations mentioned by the Supreme Court in *Liljeberg* weigh heavily against granting the retrospective relief requested.

For both sets of reasons—those related to the merits of the "impartiality" question and those related to remedy—the petition for mandamus is

Denied.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 89-1944

IN RE: ALLIED-SIGNAL INC., *et al*,
Petitioners.

ON PETITION FOR WRIT OF MANDAMUS

December 20, 1989

Before

Campbell, *Chief Judge*,
Timbers,* *Senior Circuit Judge*, and
Breyer, *Circuit Judge*

Geoffrey C. Hazard, Jr., with whom *Stephen H. Sachs, Andrew B. Weissman, Alan N. Braverman, Joseph E. Killory, Jr., Teresa D. Baer* and *Wilmer, Cutler & Pickering*, were on brief for petitioners.

Arthur R. Miller, with whom *Sherrill Hondorf, Waite, Schneider, Bayless & Chesley, Peter Berkowitz, Alvaro Calderon, Stanley M. Chesley, John Cummings, III, Wendell H. Gauthier, David C. Indiano, Will Kemp, Harvey B.*

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* Of the Second Circuit, sitting by designation.

Nachman, Jorge Ortiz Brunet, Jorge M. Suro-Ballester and *Francisco M. Troncoso*, were on brief for respondents, The Plaintiffs' Steering Committee.

BREYER, *Circuit Judge*. Forty-five (of 78) defendants in the Phase Two trial of the San Juan Dupont Plaza Hotel fire litigation (which we have described in *In re Allied Signal*, No. 89-1823 (1st Cir. ——, 1989) ("*Allied Signal I*") Slip op. at [2a-3a], including 35 of the 49 defendants who brought the petition in No. 89-1823 and 10 others, have brought a second petition for mandamus asking us to order Judge Acosta to disqualify himself and to declare a mistrial in Phase Two. They claim that two sets of financial relationships create an "appearance of partiality under 28 U.S.C. sec. 455 (a)." The first set involves Judge Acosta and Roberto J. Matos, local counsel for three of the petitioners' fellow Phase Two defendants; the second set involves Judge Acosta and Harvey L. Nachman, a counsel for plaintiffs. We shall assume the reader is familiar with the background of this litigation and the standards that we have set forth in *Allied Signal I*. We shall discuss each set of relationships in turn. For reasons set forth below, we deny the petition.

I.

The Matos Relationship

Judge Acosta, his wife, and Roberto Matos together own a corporation that owns a piece of commercial real estate, which provides Judge Acosta and his wife with investment income of about $50,000 per year. In addition, the corporation pays Mrs. Acosta a management salary and provides her with the use of a car. Mr. Matos is local counsel for three of the hotel's suppliers who are defendants in Phase Two. The petitioners have submitted an affidavit which says that Mr. Matos told "Judge Acosta prior to entering his (Matos') appearance in this case that he would *not* decline to undertake this case because of his investment with Judge Acosta," and that Judge

Acosta's potential disqualification "would *not* influence . . . his decision." (Emphasis added.)

We shall assume, for the sake of argument, that this financial relationship creates an appearance of partiality. *But cf. In re Beard*, 811 F.2d 818, 831 (4th Cir. 1987) (judge's passive investment, with local counsel for some claimants in the Dalkon Shield litigation, in an office building unrelated to the litigation, created no reasonable doubt about judge's impartiality). Even so, circumstances have recently changed so that, irrespective of the merits of the "partiality" argument, the petitioners are not legally entitled to the relief that they seek.

The reason that disqualification is not now required is that the plaintiffs have now settled their differences with Mr. Matos' clients; he will no longer appear in Phase Two; and, as far as we can tell, he will not again appear in this litigation. There is no claim that Judge Acosta is, or was, actually partial, nor do we have any reason to believe that the financial relationship with Mr. Matos would lead Judge Acosta to be other than impartial in the future. As to the future, the settlement cures the problem of appearances. *Cf. In re Webster*, 382 F.2d 79, 83 n.3 (9th Cir. 1967) (describing Ninth Circuit's dismissal of mandamus petition for judicial disqualification as moot when the relevant part of the case had been settled and a judgment of dismissal entered).

As to the past, our reasons for refusing to order a mistrial are similar to those set forth in *Allied Signal I*, Slip Op. at pp. [11a-13a]. As we there pointed out, where no actual bias is at issue, where the question is solely one of appearances, judicial actions already taken are not necessarily rendered invalid because of a circumstance that violates § 455(a). As we read the Supreme Court's *Liljeberg* opinion, we are to fashion retrospective relief with an eye towards a just result. *See Liljeberg* v. *Health Services Acquisition Corp.*, 108 S. Ct. at 2194, 2204, 2206 (1988). And, we believe it would be unfair to interrupt

the present trial. As we noted in *Allied Signal I*, Slip Op. at p. [12a], the parties have invested an enormous amount of time and expense in the Phase Two proceedings, as indicated, for example, by the 2,210 docket entries relating to that phase entered by September 14, 1989. Moreover, the declaration of a mistrial could threaten to undo settlements that have been made or that are in the offing. At the same time, the comparatively small role that Matos played in the litigation, as well as the fact that he represented parties on the same side as the petitioners, suggests that our refusal to order a mistrial would not create a serious crisis of confidence in the impartiality of the judiciary. Thus, we see no basis for issuing a writ of mandamus.

II.

The Nachman Relationship

Petitioners state that Mr. Nachman, a counsel for plaintiffs and a member of the Plaintiffs' Steering Committee, loaned $50,000 to Judge Acosta (or to his real estate venture) before Judge Acosta was appointed to the bench, that he "may well have loaned Judge Acosta money on a number of other occasions," and that he "also served as counsel for Judge Acosta's venture with Mr. Matos, attaining a favorable settlement of a lawsuit . . . for 'a nominal fee.'" Petitioners argue that this relationship "[w]hen viewed in tandem . . . with the business venture with Mr. Matos" helps their claim of partiality. They also say that "the district court's relationship with Mr. Nachman, standing alone, raises a serious question of the appearance of partiality."

Petitioners, however, very much to our surprise, fail to mention in their otherwise careful brief that Mr. Nachman loaned the $50,000 to Judge Acosta in 1978 and that the loan was repaid in 1979, before Judge Acosta was appointed United States Attorney or District Judge. In addition, Mr. Nachman represented Judge Acosta's ven-

ture *before* and not *after* Judge Acosta became United States attorney. Mr. Nachman states in his uncontroverted affidavit that "any loan, if ever made, was made before Mr. Acosta was U.S. Attorney and was promptly repaid." He adds that since Judge Acosta "became United States Attorney more than eight (8) years ago, we severed all social relationships."

We do not see how a series of social or business relationships of the sort of which petitioners complain, between a judge and lawyer, taking place more than eight years ago, before the judge's appointment, could cast significant doubt on the judge's impartiality. We do not see how these relationships could make any significant difference to our disposition of petitioners' "Matos relationship" claims. And, insofar as petitioners argue that the Nachman matters, in themselves, show unlawful partiality, their claim is frivolous.

For these reasons the petition for mandamus is

Denied.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Master File MDL-721

IN RE: SAN JUAN DUPONT PLAZA HOTEL
FIRE LITIGATION

COURT MARGIN ORDER NO. 540

DEFENDANTS' SECOND MOTION FOR RECUSAL AND MISTRIAL

Defendants' Motion for Recusal and Mistrial filed September 29, 1989 is hereby DENIED.[1] In addition, the Court understands that this matter has already been submitted to the First Circuit Court of Appeals by way of a Supplement to the pending Petition for a Writ of Mandamus.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 29th day of September, 1989.

s/ Raymond L. Acosta
RAYMOND L. ACOSTA
United States District Judge

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[1] *See* Court Margin Order No. 520 (Docket No. 12495, filed August 31, 1989) and 532 (Docket No. 12674A, filed September 15, 1989).

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Master File MDL-721

IN RE: SAN JUAN DUPONT PLAZA HOTEL
FIRE LITIGATION

COURT MARGIN ORDER NO. 532

IN THE MATTER OF THE REQUEST FOR DISCOVERY REGARDING COURT MARGIN ORDER NO. 520

Before the Court is various defendants' Motion for Additional Inquiry in Re: Court Margin Order No. 520 (Docket No. 12555, filed September 7, 1989).[1] CMO No. 520 (Docket No. 12495, filed August 31, 1989) involved a determination under 28 U.S.C. § 455 made by the Court regarding a business relationship between this Judge and Mr. Roberto J. Matos, an attorney representing codefendants Forms and Surfaces, Inc., Laminating Services, Inc., and Maharam Fabric Corp. in this case. It was made clear in the Order that this Court saw no "appearance of impropriety" issues raised under subsection (a) of the disqualification statute (28 U.S.C. § 455). Not satisfied with the import of CMO No. 520, defendants now seek extensive discovery on the issue.

When Congress amended § 455(a) and its attendant § 455(e) waiver, it did so to foster public confidence in

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[1] *See also* Honeywell, Inc.'s Notice of Non-Waiver in Light of Request for Additional Inquiry in Re: Court Margin Order No. 520 (Docket No. 12573, filed September 8, 1989).

the judicial system and promote and strengthen its integrity, while at the same time permitting parties in a case to waive their rights to perfect the recusal of a presiding judge once he has made a determination that there is an appearance of impropriety.[2] Section 455, either before or after its revisions, was never meant to allow litigants to delve into each and every aspect of a judge's financial, social and professional background. The statute leaves it solely to the judge, in his discretion, to determine whether or not an appearance of partiality exists sufficient to recuse himself. Once he has determined that recusal is mandated and he has disclosed this decision to the parties, then, and only then, is § 455(e) triggered, permitting the parties to waive their rights and, in essence, to ask the judge to continue with the case. Thus, if there is no appearance of partiality, there is no need for a disclosure, and if there is no disclosure, there can be no waiver. A party's disagreement, if any, with a judge's determination on a recusal issue must be aired before an appellate forum, which, in turn, will review the judge's decision to determine if it amounted to an abuse of discretion. *Panzardi-Alvarez v. United States*, 1989 U.S. App. Lexis 10424 (1st Cir. July 19, 1989); *Potashnick v. Port City Construction Co.*, 609 F.2d 11011, 11012 (5th Cir. 1980) *cert. denied* 449 U.S. 820 (1980). *Blizard v. Frechette*, 601 F.2d 1217, 1221 (1st Cir. 1979).

Movants allege that the information supplied by the Court by way of CMO No. 520 is not "sufficient to allow for adequately informed deliberations on this issue by the parties."[3] Before reaching that argument it may help to reflect momentarily on defendants' motivations. Do the various defendants pretend to indiscriminately plumb the depths of all of the undersigned's business, social and pro-

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[2] *See* our earlier Order No. 218 *In the Matter of the Motion Requesting Recusal* (Docket No. 12422) at p. [35a-36a].

[3] *See* Defendants' Motion at p. 3.

fessional relationships as well as those of his family in order for them to determine, selectively, which areas are not to their liking so that they might later "waive" the disqualification of the Court? Is this not a thinly veiled form of "judge shopping"? Congress and the courts have consistently explained that § 455 is not to be used as a license for litigants to engage in fishing expeditions to suit their needs or to avoid adverse consequences. H.R. Rep. No. 1453, 93rd Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Admin. News pp. 6351, 6355. *Hampton v. City of Chicago*, 843 F.2d 478 (7th Cir. 1981); *United States v. Cowden*, 545 F.2d 257, 265 (1st Cir. 1976). More important, however, is the fact that defendants have nothing to waive since this Court has already determined that there is no appearance of impropriety. Consequently, their motives are, once again, suspect, particularly when it is apparent to this Court that the connection to Matos was known to movants even before they filed their first motion for recusal and the corresponding Writ of Mandamus regarding two of the law clerks.[4] This second attempt to question this Court's ability to conduct an impartial trial once again points to defendants' unrelenting, piecemeal quest to derail the ongoing trial proceedings. To defendants, forgetting the vast sums of money spent by all those involved in this Second Phase (without mentioning the enormous amount of time and energy already expended by both parties and the Court[5]) and starting a new trial represents nothing more than ". . . a relatively minimal [disruption]."[6] Notwithstanding this delusory representation, it

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[4] *See* Defendants' Motion for Disqualification, Recusal and Mistrial, (Docket No. 12237, filed August 14, 1989), and Writ of Mandamus, August 29, 1989.

[5] Simply by way of a short example, in the three months of trial preparation and trial of this *Second Phase* only; i.e., between June 1, 1989 and September 14, 1989, there have been 2,210 docket entries, 699 exhibits admitted, 143 orders issued and 57 witnesses examined.

[6] *See* Petition for Mandamus at p. 40.

should by now be pristinely clear to moving defendants that merely raising the specter of an impropriety of their own creation before a Court should not and will not cower a judge into automatic self-disqualification. *See e.g. United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985) "The statutory standard *puts to the judge* a question about the objective state of the legal and lay culture. The Court must consider whether an astute observer in either culture would conclude that the relation between judge and lawyer (a) is *very much* out of the ordinary course, and (b) presents a potential for actual impropriety if the worst implications are realized." *Id.* at 1537. (Emphasis added.)

Even if we were to assume that disclosure and waiver are at issue here, as far as this Court is concerned, *all material facts*[7] concerning the business relationship with attorney Matos in these proceedings were set forth in Court Margin Order No. 520.

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[7] It is clear that movants, despite their prior knowledge, did not raise this issue before because it undermines their perennial argument that the Court must be favoring plaintiffs because two of its law clerks purportedly have brothers in firms working on plaintiffs' side. (In fact, there are brothers on *both* sides of this case.) Movants cannot countenance the fact that one of their own has had business contacts with the undersigned because, if their logic were extended, if this judge was favoring any side, it would be defendants. But their logic is not the Court's own. No side has been favored and no reasonable person knowing all the facts could have reached a contrary conclusion. In a desperate attempt to twist the facts to fix their "favoritism-towards-plaintiffs" argument they now say that they "have heard" that Attorney Harvey Nachman lent money to the presiding judge. This is an irresponsible way of dealing with a remote and innocuous fact: Harvey Nachman lent approximately $52,000 to the corporation formed by Mr. Matos and the undersigned in 1978 (at the time the undersigned was employed as a trust officer with a bank). He was paid in full in 1979. No other loan was ever made and the undersigned was appointed judge in 1983. *See* PSC's Motion and Affidavit in Response to Defendant's Request for Information Regarding CMO No. 520 (Docket No. 12661, filed September 14, 1989). None of this information is material to the § 455 question.

As such, the "full disclosure" which may have been called for by § 455 if the appearance of impropriety had existed, was placed on the record. Defendants' claim that 455(a) calls "for a full and objective evaluation [by the parties]" is nothing more than a mere reflection of wishful thinking. They seek to have the undersigned and his wife reveal to them every detail of their personal finances for the last eleven years supposedly because "[t]he Court's disclosure to date does not provide sufficient facts essential to determine whether the application of the objective 'reasonable man' test would call for recusal on the basis of this business relationship." Defendant's memorandum at 4-5. Moving defendants are engaging in a brazen usurpation of the Court's role. It is for this Court to apply the appropriate legal standard to the legal issues before it—not the parties.

Having failed to tarnish this Court's probity with their earlier unfounded allegations,[8] movants resort to using rumors—as they themselves admit—, and processed representations of "responses," supposedly made by the very person who "is unwilling to provide [the] affidavit" with which they evidently hope to supplement their quest for the recusal of this judge. But mere allegations are not facts, and even those facts considered pertinent must be viewed with a discerning eye given the *realities* and *size* of this jurisdiction, the complexity of this case and the multiplicity of the parties at trial,[9] let

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[8] *See* earlier motion for recusal and mistrial.

[9] As an example, the relationship which defendants attempt to paint as "improper" is not between the undersigned and a party, but between this judge and one of approximately 225 lawyers in this case. As consistently held by many circuit courts when faced with similar recusal petitions, "a judge need not disqualify himself just because a friend—even a close friend—appears as a lawyer" *Murphy*, 768 F.2d at 1537; *In re United States*, 666 F.2d 690 (1st Cir. 1981); *Parish v. Board of Commissioners*, 524 F.2d 98 (5th Cir. 1975) (en banc.) Cf. *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 680 (7th Cir.), *cert. denied*, 104 S.Ct. 529 (1983).

alone considering the remoteness of some of the facts presented, such as the 10-year-old loan episode with Mr. Nachman. This Court has little doubt that many, if not all, of the defendants have had knowledge of this business relationship for some time.[10] In the instant motion, movants' claim to ignorance is only as to the "nature and extent of the [relationship]." It can be inferred, accordingly, that defendants had known that a relationship existed but that it only *recently* became important to them to make further "inquiries" into this issue. Again, the timing of this motion, could not be more revealing as to an ulterior motive.

Apparently assessing their arguments in the earlier motion for recusal as insufficient, defendants seek to raise yet another "appearance of impropriety" issue. To quote a fellow judge: "what must be said is that the alleged appearance of partiality was only an apparition —not a true appearance of partiality".[11] This judge will not fall into defendants' insidious ploy to conduct a public voir dire on his financial, social and professional associations. That was and is a mission properly left by the Constitution to the confirming Senators.

In conclusion, it is evident that movants "[p]resent fears are less than horrible imaginings," *In re: Public Service Company of New Hampshire*, slip op. No. 89-1174 (1st Cir. August 24, 1989), at 3 (quoting W. Shakespeare, *Macbeth*, Act I, Sc. iii, ll. 138-39 (1606)), accordingly, Defendants' Motion for Additional Inquiry in Re: Court Margin Order No. 520 (Docket No. 12555, filed September 7, 1989) and Honeywell's Notice of Non-Waiver in Light of Request for Additional In-

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[10] We must assume that at the very least Mr. Matos fulfilled his ethical duty to disclose this business relation with the undersigned to his clients and to his stateside counsel as soon as he was retained as counsel in this case, which dates back to May 1987.

[11] *Duke v. Pfizer, Inc.*, 668 F. Supp. 1031 (E.D. Mich. 1987).

quiry in Re CMO No. 520 (Docket No. 12573) are hereby DENIED.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 15th day of September, 1989.

/s/ Raymond L. Acosta
RAYMOND L. ACOSTA
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Master File MDL-721

IN RE: SAN JUAN DUPONT PLAZA HOTEL
FIRE LITIGATION

COURT MARGIN ORDER NO. 520

ORDER IN THE MATTER OF
ROBERTO J. MATOS, ESQ.

After the issuance of Order 218 (Docket No. 12422, filed August 25, 1989), it was brought to my attention that a business relationship with Roberto J. Matos, counsel for codefendants Forms and Surfaces, Inc., Laminating Services, Inc., and Maharam Fabric. Corp. might be viewed as an additional argument for recusal. My wife and I are equal shareholders with Roberto J. Matos in a passive corporation that owns commercial property in Carolina, Puerto Rico since approximately 1979. I am not now nor have I ever been an officer or director of the corporation nor do I have any direct participation in its affairs. My intervention with the corporation has been limited to accompanying my wife to a yearly meeting with the accountant for tax purposes.

In light of the recent petition for recusal, I have carefully examined the relevant law and considered the pertinent facts and I do not find that this relationship in any way mandates my disqualification from this case under 28 U.S.C. sec. 455. Nonetheless, in spite of the fact that I have reason to believe that this relationship has been common knowledge to many of the parties for

some time, I thought it advisable to make this announcement in the event it is a matter of concern to any of the parties.

IT IS SO ORDERED.

In San Juan, Puerto Rico, the 31st day of August 1989.

/s/ Raymond L. Acosta
RAYMOND L. ACOSTA
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Master File MDL-721

IN RE: SAN JUAN DUPONT PLAZA HOTEL
FIRE LITIGATION

[Filed Aug. 24, 1989]

ORDER NO. 218

IN THE MATTER OF THE MOTION REQUESTING RECUSAL

I. MOTIONS FILED

A group of defendants [1] have filed a motion requesting that the undersigned judge recuse himself from this

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[1] The movants comprise approximately half of the defendants in the second phase of trial which began June 27, 1989. This trial phase started with ninety defendants of which twelve have been officially dismissed. *See* Pretrial Order No. 204 (Docket No. 11692, filed June 27, 1989). The forty movants are represented by approximately twenty-seven law firms including local counsel for stateside firms. The names of these moving defendants are included in Appendix A to this Order.

In addition, four other defendants, to wit, La Cor Wicker and the "Erickson Group," represented by three other law firms, have filed a separate motion for mistrial based on the relationship between one law clerk, Richard Graffam, to a partner in a firm representing plaintiffs, William Graffam. Importantly, those four defendants did not join in the motion for recusal yet interestingly they simply request that the Court declare a mistrial and that it

case, that he disqualify two of his three law clerks from further participation in this trial, that he vacate all prior orders issued in this litigation and declare a mistrial of the proceedings held thus far. The motion is based exclusively on the fact that the two law clerks in question have siblings who are members of or are otherwise associated with law firms engaged in this complex case. *See* Defendants' Motion for Disqualification, Recusal and Mistrial (filed under seal), docket No. 12237, filed on August 14, 1980.

The bare factual basis for movants' drastic request is that Mr. Richard Graffam and Mrs. Vilma Vilá, two career law clerks who have worked, as part of a team effort with the undersigned and other members of his staff, on this litigation since its inception two and a half years ago, have brothers [2] who are members of law firms that represent plaintiffs and the San Juan Dupont Plaza Hotel. The nub of the controversy here is whether or not the presiding judge must disqualify himself because two of his law clerks are related to lawyers whose law firms

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vacate only those rulings that have been "adverse to any defendant." For the reasons below, this motion filed under seal on August 14, 1989, docket No. 12234, is hereby DENIED.

Finally, another two defendants, The Trane Company & Trane Export, represented by Amancio Arias Guardiola, filed a motion to join the recusal motion. However, this joinder request was filed beyond the Court's deadline, and it also came completely unsupported by affidavits. Consequently, the request to join, filed under seal on August 14, 1989, docket No. 12233, is hereby DENIED.

[2] They are William Graffam of Jiménez, Graffam & Lausell, and Raul Vilá of Fiddler, González & Rodriguez. Although movants do not mention it in their motion, Mr. Richard Graffam in fact has another brother, Keith Graffam, who has actively participated in this litigation in representation of two insurers for certain defendants. In addition, Mrs. Vilá's husband, Doel Quiñones, was an associate of the law firm of O'Neill & Borges which represents Insurance Services Offices, Inc.; ISO Commercial Risk Services, Inc.; and ISO Telecommunications, Inc., defendants in this second phase of trial. Mr. Quiñones worked in O'Neill & Borges from 1981 to April of 1988.

have a financial interest in this litigation. Movants contend that this relationship standing alone casts a significant doubt, in the minds of the reasonable Puerto Rican public, about the impartiality of this Court which warrants recusal under 28 U.S.C. § 455(a). They also allege that since there is case law that places judges and their law clerks on equal ethical footing, 28 U.S.C. § 455(b)(5)(ii) and (iii) (1988),[3] must be applied to the law clerks as well.

Plaintiffs have countered these arguments by stating that section 455(b)(5) applies only to the judge and not to his employees. As to section 455(a) they argue that no appearance of impropriety exists when one considers: the tenuous personal connections that have been challenged which do not go directly to the judge; the fact that the family ties, such as they are, exist on both defendants' and plaintiffs' sides; that the size and complexity of this case not only diffuse the normal standards concerning appearances, but also counsel strongly against changing judges and causing an enormously difficult and costly case to begin anew; and, finally, that defendants' motivations are suspect given the untimeliness of their motion and their constructive, if not actual, knowledge of the situation they are now challenging. *See* plaintiffs' opposition to defendants' motion, docket No. 12261, filed August 16, 1989.

II. THE ISSUES

There are two controlling issues in this case.

1. Does 28 U.S.C. Section 455(b)(5), which requires a *judge* to automatically recuse himself, based on particular family relationships, apply to the judge's law clerks?

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[3] This section mandates the recusal of a judge when a family member within the third degree of relationship to either him or his spouse appears as an attorney before him or has a financial interest in the outcome of the proceeding.

2. Does the fact that law clerks who are part of the Court's "Dupont Team" and who have siblings that work for law firms representing both the defense and prosecution sides of this case make a reasonable man who is fully informed of all the facts entertain a significant doubt about the presiding judge's impartiality given the complex nature of the case and the timeliness of the recusal motion?

III. DISCUSSION

A. APPLICABILITY OF 28 U.S.C. § 455(b)(5) TO LAW CLERKS

Starting with the premise that "[t]he law subjects a judge's law clerks to the same ethical constraints that govern the judge," Defendants' Memorandum at 17-18, (citing *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1525 (11th Cir. 1988), *cert. denied*, 109 S.Ct. 2066 (1989); *Hall v. Small Business Administration*, 695 F.2d 175, 179 (5th Cir. 1983), and *Miller Industries, Inc. v. Caterpillar Tractor Co.*, 516 F. Supp. 84, 89 (S.D. Ala. 1980)), movants leap to the erroneous conclusion that section 455(b) applies to law clerks. However, that provision, by its own terms, applies exclusively to judges.[4]

With a blind eye, movants read as the "clear requirements of Section 455(b)" that it is "indisputable" that Richard Graffam and Vilma Vilá must be disqualified.

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[4] Section 455(b) reads in relevant part:

> . . .
>
> (b) He [any justice, judge, or magistrate of the United States] shall also disqualify himself in the following circumstances:
>
> . . .
>
> (5) He or his spouse or a person within the third degree of relationship to either of them, or the spouse of such person:
>
> . . .
>
> (ii) Is acting as a lawyer in the proceeding;
>
> (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding.

This Court sees nothing clear or indisputable about movants' argument. Quite the opposite; if anything is pellucidly clear it is the fact that neither the straightforward language of Section 455(b) nor any case law regarding it support their slim contentions. Movants have cited no case where a court has disqualified a law clerk pursuant to Section 455(b) and we can find none. It is not surprising then that in their twenty page brief, a scant two pages address this issue.

We begin where we must—with the unambiguous language of Section 455(b)(ii) and (iii). The pointed text of the statute addresses only a *judge's* blood ties to litigants appearing before him or having a substantial interest in the outcome of the case. Unlike Section 455(a) with its more amorphous language of reasonable questions of impartiality (read: appearance); Section 455(b) leaves nothing to question. It is meant to automatically exclude judges from situations that fall under the specific provisions of the statute. In that sense, Section 455(b) is meant to supplement Section 455(a) by detailing situations that Congress considers to be tantamount to actual bias.[5] If a *judge* has a relative working or benefitting in some way from the case, he must recuse himself. Because of the specific and forceful nature of this section, it must be construed narrowly. Thus, when Congress says judges,

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[5] The fact that Section 455(b) does not apply to law clerks, does not mean that they can act with impunity. But the pall that the conduct of a law clerk may cast over the integrity of his judge, is covered by the appearance of impropriety notion inherent in 455(a). Nonetheless, whatever appropriate ethical foothold law clerks must obtain in the employ of the judiciary; the judge cannot be made an easy victim of the clerk's follies or perceived faults. "If a clerk has a possible conflict of interest, it is the clerk, not the judge, who must be disqualified." *Hunt v. American Bank & Trust Co. of Baton Rouge*, 783 F.2d 1011, 1016 (11th Cir. 1986). "For purpose of determining whether a judge should disqualify himself, views of the judge's law clerk cannot be attributed to the judge." *In Re Corrugated Container Container Antitrust Litigation*, 614 F.2d 958, 968 (5th Cir. 1980).

it means judges; not their law clerks, secretaries or courtroom staff. The various staff members of a judge may have something to do with the public's perception of that court—but Congress wisely left that matter to an *ad hoc* interpretation by the courts when it fashioned Section 455(a). With similar judiciousness, Congress decided that there were simply some circumstances—some relationships or financial connections, if you will—that had to *a priori* control a judge's hand. Given the drastic measure employed, the limitations had to be explicit.[6] These situations, and these alone, were considered *per se* violations of proper judiciary procedure under 455(b). Bedrock rules of statutory interpretation can lead to no other conclusion: "Inclusio unius est exclusio alterius," the inclusion of one is the exclusion of another. In the case at bar, Congress' certain designation of one person, a judge, in the limiting language of Section 455(b), is an absolute exclusion of all others, including law clerks.

The cases cited by the defendants in support of their section 455(b) arguments are inapposite to their prayer for relief.

In *Parker v. Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988) where the Court of Appeals held it was harmless error for a district court not to have recused itself when the judge's law clerk was the son of a partner (who in turn had been a former law clerk to the judge) in the firm representing the prevailing party, the court's holding was based entirely on Section 455(a). *Id.* at 1528. The Court mentioned 455(b) in dictum only for the purpose of extending the harmless error standard of review to *all* of Section 455. The Eleventh Circuit never applied Section 455(b) to disqualify law clerks as defendants pretend this Court should do in the instant case.

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[6] *See Liljeberg v. Health Services Acquisition Corp.*, —— U.S. ——, 108 S.Ct. 2194 at 2202 (1988), n.8 ("section 455(b) is . . . a somewhat stricter provision, and thus is not simply redundant with the broader coverage of § 455(a) . . . .").

In another case, *Hall v. Small Business Admin.*, 695 F.2d 175 (5th Cir. 1983), wherein a magistrate's law clerk had been a plaintiff in a class action suit before the magistrate, the Fifth Circuit specifically found that there was a sufficient appearance of impropriety to mandate recusal. Again, the *Hall* court relied exclusively on Section 455(a).

Movants' misleading presentation of the case law in this area is at best a tautological exercise in the use of principles applicable to Section 455(a) to subvert the clear import of Section 455(b) and its attendant jurisprudence. *See, e.g., Barksdale v. Emerick*, 853 F.2d 1359, 1362 (6th Cir. 1988) (fact that one of the litigants had a son working for the presiding judge was not a *per se* basis for a section 455(b) disqualification, albeit it was cause for concern under Section 455(a)).

In short, movants twist the clear text of Section 455(b), while ignoring long established notions of statutory interpretation, to serve their own purposes. Since Section 455 (b) cannot be triggered because there are no direct ties between the litigants and the judge, movants cannot and do not seek the recusal of the judge through this provision. Rather, they attempt to use this explicit law as a trap door to rid the judge of two of his clerks. This a maneuver that has no legal support.

B. *SECTION 455(a): APPEARANCE OF IMPROPRIETY*

Section 455(a) reads as follows: "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." This language was codified in 1974 by a Congress concerned with promoting and ensuring public confidence in the integrity of the federal judiciary. As part of that goal, Congress changed the test for a Section 455(a) recusal from a subjective one, which contained a presumption against disqualification other-

wise known as a "duty to sit," to an objective one, where it was no longer the judge's personal opinion that controlled, but rather his application of a "reasonable man" standard.[7] The tenet of Section 455 has remained the same throughout its various amendments; that being that the confidence of the lay public in the judiciary depends on judges avoiding even the appearance of impropriety whenever possible. *See Liljeberg v. Health Services Acquisition Corp.*, —— U.S. ——, 108 S.Ct. 2194, 2205 (1988) (Citing S. Rep. No. 93-419, at 5; H.R. Rep. No. 93-1453 at 5). Thus, Section 455(a) has become broadly known as the "appearance of impropriety" provision of the recusal statute.

The First Circuit Court of Appeals has amply recognized the "competing twin policies" of Section 455(a): the "obvious one" being to help appearances of fairness cement the public confidence, and the "less obvious policy" being that ". . . a judge once having drawn a case should not recuse himself on an unsupported, irrational, or highly tenuous speculation. . ." *In Re United States of America* 666 F.2d 690, 694, (1st Cir. 1981). Should the importance of this "less obvious" policy escape anyone, the First Circuit pointedly concluded that maintaining the purity of appearance is not worth the cost of giving litigants a negative veto power over the assignment of judges.

It is precisely to avoid this danger that Section 455 must be narrowly construed, *See, e.g., State of Idaho v. Freeman*, 507 F. Supp. 706, 733 (D. Idaho 1981), and the allegations of counsel must pass the litmus test of good faith. Thus, it was Congress' clear intention—as the fed-

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[7] The original Section 455 read in its entirety:

> Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

June 25, 1948, C. 646, 62 Stat. 908.

eral courts have consistently held—that a Section 455 disqualification should not be allowed on the bases of rumors, innuendos, unsupported allegations, or claims that like blind moths, flutter aimlessly to oblivion when placed under the harsh light of the full facts. In short, the strategic maneuverings of counsel cannot divert the true course of the judicial process already navigated by an impartial judge. *Blizard v. Frechette* 601 F.2d 1217 (1st Cir. 1979).

To summarize: while a judge is charged with the duty of maintaining the appearance of impartiality whenever he can he must also be wary of the possible improper motivation behind an application for disqualification. In this vein, a challenge to a judge's appearance of impartiality must be convincing in light of (1) the nature of the case, (2) the facts and (3) the timeliness of the motion.

With these policies and guidelines in mind we need to examine the legal standard applicable to this case and whether or not movants have met their burden.

1. NATURE OF THE CASE

A. MANAGEMENT

In re San Juan Dupont Plaza Hotel Fire Litigation, No. MDL-721, is the multi-district case that arose out of the catastrophic fire that engulfed the San Juan Dupont Plaza Hotel on New Year's Eve 1986, killing 97 people and injuring scores of others. The first fire-related lawsuit was filed barely five days after the blaze and assigned to this judge. Several months later the Multi-District Litigation Panel transferred a case filed in California to Puerto Rico for pretrial procedings with the cases already pending in this district, thus making the undersigned the transferee judge for this litigation.[8]

[8] In due time, the cases were all consolidated for trial purposes as well. *See* Pretrial Order No. 130 (Docket No. 7400, filed December 21, 1988).

The litigation grew quickly in heroic proportions. More than 250 individual complaints were filed by 2,300 plaintiffs suing in excess of 200 defendants for damages totalling approximately two billion dollars. This immediately spurred the undersigned into an active managerial role to organize and control the litigation in an innovative way in order to ensure the fulfillment of the Court's paramount duty: "to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1.

Based on the foregoing, two basic types of organization were immediately required: (1) organizing the parties and (2) organizing the courthouse. The first required the formation of several committees of lead attorneys to streamline the huge task of gathering and presenting evidence for all concerned. In the main, the most important committees have been the Plaintiffs' Steering Committee ("PSC") comprised of eleven lawyers and their respective law firms and charged with representing all the plaintiffs' interests in this case and the Discovery Committee composed of ten defense attorneys representing ten distinct categories of defendants and three members of the PSC for a total of thirteen members. The Discovery Committee's task, as the title implies, was to coordinate and handle most discovery matters. Importantly for the issues before us, the members of these committees underwent an application and selection process established by the Court in which *all* the parties participated. *See* Pretrial Order No. 127 ("Case Management Order", docket No. 7100, filed December 2, 1988), Section IV(D) and IV(E) at pp. 24-60.

The management of this case from the point of view of the courthouse was approached from the beginning as a team effort. Initially, the "Dupont Team" consisted of the law clerks already working in chambers, Vilma Vilá and Richard Graffam, as well as the secretary, docket clerk and courtroom deputy clerk. Soon after, Magistrate Justo Arenas and his law clerk joined the team. Since

the existing staff could not handle the entire litigation and the Court's regular workload of over 300 cases—which the Court to this day is still handling simultaneously [9]—an additional law clerk, Pedro Malavet, secretary and docket clerk were hired in September of 1987. In July of 1989, Mr. Malavet entered private practice and was replaced by Ms. Edilia Vázquez.

The dynamics within the "Dupont Team" have remained the same throughout. All law clerks and the magistrate have been active in "brainstorming" sessions, and at times, even role playing situations are used to explore all possible strategies and their ramifications. Suggestions are made by all equally, but the ultimate decision has always been made by the undersigned. The goal is simple: to anticipate problems and to make sure the discovery machine, and later the trial proceedings, are working as smoothly as possible. The team approach ensures that there is always someone available at any given time to continue with the orderly non-substantive operation of the case despite absences due to vacations, illnesses or resignations. There is also an added benefit in the wide range of input received with respect to methodology, systems, innovative ideas, and research.

To engage in an understatement concerning this litigation: the managerial role of the Court in this case has had to transcend the administration of an ordinary civil proceeding. The Dupont Team approach has been critical in this administration.

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[9] Currently, the Court has a caseload of 450 civil cases, including the Dupont, and 20 criminal cases. In addition, an average of 30 new cases are assigned to this judge every month. The Dupont trial normally proceeds daily from 9:30 a.m. to 2:30 p.m.; trials of "regular" cases and other matter are handled in the late afternoon at times in a distant courtroom. (The courtroom constructed specially for the Dupont trial is in Hato Rey while the U.S. District Courthouse where criminal proceedings are held is located in Old San Juan.)

B. TWO AND A HALF YEARS OF LITIGATION

The pretrial discovery, in the words of the First Circuit, was a "gargantuan undertaking." *In Re San Juan Dupont Plaza Hotel Fire Litigation*, 859 F.2d 1007 (1st Cir. 1988). More than 3,000,000 documents were produced, countless interrogatories were served, and depositions, up to 25 in a single day across various states and foreign countries, totalled 2,200 over a nine-month period. A special "Joint Document Depository ("JDD") had to be established to handle the depositions and facilitate the millions of documents and hundreds of pieces of evidence to all parties.

This "litigatory monster," another variegated and poignant metaphor used by the First Circuit, *see In Re Recticel*, 859 F.2d 1000 (1st Cir. 1988), has been far from inexpensive compared to other cases. Yet, in spite of its size and complexity, substantial savings and speediness have been achieved. Nonetheless, current estimates place the costs in terms of attorneys fees and expenses in the tens of millions of dollars. Considering the legion of attorneys involved in this case, this exorbitant expense is not difficult to conceive. There are more than 230 attorneys in the service list and this does not include the hundreds of associates and paralegals that work with them.

The case file consists of over 200 volumes, which includes more than 12,000 docket entries (the docket sheet alone is in excess of 500 pages). The Court has issued more than 200 pretrial and trial orders, including a 220-page "Case Management Order," and over 500 "margin orders."

The trial of the case was scheduled in phases. The first phase involved the "Dupont Family" and was resolved after two months of trial. The current trial phase dealing with the "products and services" defendants began in June of 1989. The pretrial memorandum for the

current phase alone comprises 40 volumes containing 17,000 pages.[19] A substantial amount of testimony and documentary evidence has already been presented.

C. SUMMARY

The engulfing nature of this case, and the manner in which it has been handled, plays an important role in determining what "appearances" can reasonably be garnered from it (we are convinced that only a perception of propriety and fairness will prevail). In raising the spectre of partiality movants claim that they have discovered an "appearance of impropriety" sufficient to compel the Court to dismantle the entire process it has so carefully and laboriously established over a period of two and a half years. As plaintiffs have correctly stated: "The ripple effect of granting defendants' motion would be a tidal wave of delay, costs, and loss of confidence in the system. Recusal of the judge would flood this Court with motions to set aside all prior orders and settlements in this proceeding and place countless other procedural machinations at defendants' disposal. These factors weigh heavily against mistrial and recusal." Plaintiffs' memorandum in opposition . . ., docket No. 12261, at page 9.

2. GROUNDED ON FACTS

The relevant test for a Section 455(a) recusal is whether the charge of impartiality is sufficiently grounded on facts to create in the mind of the fully informed objective disinterested observer of our community a reasonable or significant doubt concerning the judge's impartiality. *U.S. v. Cowden*, 545 F.2d 257, 265 (1st Cir. 1976); *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524 (11th Cir. 1988), *cert. denied*, —— U.S. ——, 109 S. Ct. 2066 (1989); *Smith v. Pepsico, Inc.*, 434 F. Supp. 524 (S.D.

[19] Members of the Joint Document Depository weighed the Pretrial memorandum in at 149 pounds.

Fla. 1977) (community Standard); *Hall*, 695 F.2d at 176.

The key to the test is whether there is a *reasonable factual basis* for disqualification in this case. *Cowden*, 545 F.2d at 265.

Moving defendants argue that "[t]o any reasonable lay observer, the continuous, active participation of law clerks who are related to persons having an interest in the litigation has created the appearance of impropriety . . . [a]ccordingly, the law requires the immediate disqualification of the Court and the declaration of a mistrial." Defendants' Memorandum at 14. Their simple *basis* for this draconian remedy is that the law clerks,[11] Richard Graffam and Vilma Vilá, have brothers who work at law firms that represent parties in this case.

Although there is not a single case directly on point, movants have canvassed an entire line of cases dealing with conflicts of interest of law clerks due mostly to employment offers by litigants to vainly support their allegations that "the clerks' intimate involvement in this litigation has forever tainted the proceedings." Defendants' Memorandum at 14. Clearly this case does not involve a situation were a law clerk accepts a promise of employment from a party or otherwise has a pecuniary interest in the case. Therefore, we find the great majority, if not all, of the cases cited by defendants inapposite to the facts before us.

Parker v. Connors, 855 F.2d 1150 (11th Cir. 1988), a case relied upon by defendants, involved a law clerk whose father was a partner in the firm representing defendants in a case before the law clerk's judge. Readily distin-

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[11] From our discussion in the previous section of this order it is not disputed that Section 455(a) as opposed to 455(b), *does* apply to law clerks but the caselaw, as will be explained below, has generally drawn a limit to pecuniary interests, particularly future employment.

guishable from our situation, however, were the facts that the law clerk's father had also been a law clerk to the district judge; the judge had a habit of giving credit to his clerks in his opinions and treating them as quasi-judges, and the law clerk had presided over a hearing with counsel in the absence of the judge. In addition, the case involved only one defendant. The Court of Appeals in *Parker* refused to express an opinion as to "whether any of the above facts *standing alone* would rise to a level of a section 455(a) violation." *Id.* at 1524-25 (emphasis added). Rather, it was the aggregate of these circumstances that led to a reversal.[12] The *Parker* Court went on to caution that its decision in that case was not to be interpreted as "imputing to the district judge any appearance of impartiality on the part of the law clerk." *Id.* at 1525 (citations omitted).

The main question here remains whether a reasonable Puerto Rican, given our small legal community and the gargantuan size of this case, would reasonably believe that because 2 out of the 3 law clerks to the undersigned have relatives in law firms representing both sides of the litigatory fence that this judge might, by his legal decisions,[13] confer a favor on either defendants or plaintiffs in order to please one of his clerks over the other. *Ricci v. Key Bancshares of Maine*, 111 F.R.D. 369 (D.Me. 1986). We think not. To recapitulate: two of

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[12] *Cf.* w/*Parrish v. Board of Com'rs. of Alabama State Bar*, 524 F.2d 98 (5th Cir. 1975) wherein the Circuit Court conceded that in determining the need for disqualification, all circumstances bearing upon it should be considered, yet refused to accept the contention that a variety of circumstances, each insufficient if standing alone, would mandate sufficiency in the aggregate.

[13] It is also worthwhile to note that it is the jury in this case, and not the judge, who will ultimately determine the fate of both plaintiffs and defendants. *See, e.g., Simonson v. General Motors Corp.*, 425 F. Supp. 574 (E.D. Pa. 1976) ("It is also noteworthy that this case will be tried to a jury; hence that body will determine all factual matters.").

the law clerks of the undersigned judge have brothers who work in law firms representing parties in this case. Richard Graffam has a brother, William, who is a named partner in one of the eleven law firms that compose the Plaintiffs' Steering Committee which in turn represents over 2,300 plaintiffs (themselves individually represented by countless attorneys) in this litigation. Another brother, Keith, is an associate in a law firm representing the insurers of the Dupont Hotel. Vilma Vilá has a brother, Raul, who is a partner in the firm representing the Hotel itself and her husband, Doel Quiñones, worked until last year for a law firm that represents three defendants in the current trial phase. Given that these relationships, not in themselves significant, are nonetheless representative of both the prosecution and defense interests in this case, it is hard to imagine how this Court could, in the public's eye, fall from the high wire of propriety when the balancing pole is so evenly weighted —particularly in a case of this magnitude.

Movants make (too) much of the fact that the Court never officially disclosed these relationships of his clerks to the attorneys-even though the Court knew about it all along. This is putting the cart before the horse. A judge's duty to disclose and thereby disqualify himself is automatically triggered by any relationship he may have to the parties or their attorneys. Here there is none. A judge, however, must also be careful to avoid appearances of impropriety. Should he happen upon one, he should disclose it immediately and recuse himself *unless* the parties waive their rights under Section 455 (e). It is important to remember that Section 455(a) does not provide the *judge* with an option: He *must* recuse himself if there is an appearance of impropriety. The parties do have an option; however, it is premised first and foremost in the existence of a need to recuse by the judge. This judge did not ever and still does not feel that the tenuous connections drawn by defendants, given all the circumstances, create a true appearance of

partiality. Nor is there any case or statutory law that would, or can, inform this judge that the situation is otherwise. Section 455(a) cannot be drawn so broadly as to make any possible family line between a mammoth case such as this and the judge's chambers, as opposed to the judge himself, automatically fall under the shadow of dubious appearances. Thus no recusal (or mistrial) is appropriate in this case. Disclosure, on the other hand, is relevant only to the waiver provisions of Section 455 (e) and that is not in issue here.

Finally, the Court is truly at a loss to understand why movants insist on portraying this issue as one that is indisputable and clearly established. Defendants have approached this matter as if they had suddenly found a hidden passageway and uncovered some dark musty tomb full of evil secrets and Court family skeletons when the only mystery before us is why these competent attorneys, veterans of years in this litigation, would engage in this charade of being somehow blinded by the Court when the road to their tentative and belated findings was full of arrows pointing in the right direction.

3. TIMELINESS

Even though Sec. 455 does not specifically mention a timeliness requirement, we find that it is a requisite to petitions based on this statute, *see Apple v. Jewish Hospital and Medical Center*, 829 F.2d 326, 333 (2nd Cir. 1987); *In re City of Detroit*, 828 F.2d 1160, 1167 (6th Cir. 1987); *In re International Business Machines Corp.*, 618 F.2d 923, 932 (2nd Cir. 1980), and that it will be considered as one of the factors in ruling on petitions filed under this provision. *Apple* 829 F.2d at 334; *In re City of Detroit*, 828 F.2d at 1167.

In this sense, there is an important threshold requirement to all petitions for recusal and that is good faith on the part of the petitioner. Implicit in this good faith showing is the timeliness of the motion. *See In re United*

States of America, 666 F.2d at 695 ("the potential waste of judicial resources alone requires that a motion for disqualification be timely filed.") *See also Hall v. Small Business Admin.*, 695 F.2d at 179. Timeliness also comes into sharp focus when considering the amount of time, work and money that has been expended on the case when the motion for recusal is filed. *In re International Business Machines Corp.*, 618 F.2d at 933; *City of Cleveland v. Cleveland Elect. Illuminating Co.*, 503 F.Supp. 368, 370 (N.D. Ohio 1980).

One of the purposes behind the timeliness requirement is to protect the Court and the judicial system from petitions motivated by a desire to protract the litigation, *U.S. v. Durrani*, 835 F.2d 410, 427 (2nd Cir. 1987) ("safeguard . . . from last-minute dilatory tactics") or save it as a tool to use conveniently depending on how the proceedings develop. "[A] movant may not hold back and wait, hedging its bets against the eventual outcome." *Apple*, 829 F.2d at 334. *See also Phillips v. Amoco Oil*, 799 F.2d 1464, 1472 (11th Cir. 1986) ("counsel . . . may not lie in wait, raising the issue only after learning of the court's ruling. . .")

In its eagerness to safeguard the appearance of impartiality of judges when it fashioned section 455(a), Congress did not overlook the opportunities for abuse inherent in the new reasonableness standard. The House Report contains a message constantly echoed by the Courts. Addressing the possibility that counsel might seek an unfair litigation advantage, Representative Cowden stated that "Litigants . . . are not entitled to judges of their own choice." The Report continues: ". . . in assessing the reasonableness of a challenge to his impartiality, each judge must be alerted to avoid the possibility that those who would question his impartiality are in reality seeking to avoid the consequences of his expected adverse decision. Disqualification for lack of impartiality must have a reasonable basis. Nothing in

this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a 'reasonable fear' that the judge will not be impartial." (H.Rep. No. 93-1453, 93 Cong., 2d Sess. reprinted in 1974 *U.S. Cong. Code Admin. News*, 6351, 6355).

Even if we were to take defendants' arguments at face value, we find that they failed to diligently bring this matter to the attention of the Court. This issue was first presented to the Court at the *in chambers* meeting by the members of defendants' trial liaison counsel on August 7, 1989 yet defendants knew of the facts supporting their request at least by July 14, 1989,[14] when opening arguments in the second phase concluded. Arturo Diaz in his affidavit states that he first realized that the firm of Jimenez, Graffam & Lausell had an economic interest in these proceedings when he spoke with William Graffam during opening arguments.[15] The presence of William Graffam in the courtroom during opening argument seems to have triggered, according to defendants, their knowledge as to the relationship.[16]

At the latest, according to the affidavit of Victor Maddox, he became aware of this relationship on or about July 20-21 [17] and yet the matter was brought to the attention of the Court on August 7, 1989 after a substantial amount of evidence had been presented and after certain unpopular rulings concerning these defendants were issued.

In addition, the Court is not convinced by defendants' arguments that it was not until recently that they were able to ascertain the facts supporting their allegations of appearance of impropriety.

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[14] Opening arguments lasted from July 10 to July 14, 1989.

[15] Paragraph 5.

[16] See statement of Mr. Massery at Tr. 17.

[17] Paragraph 6.

In their affidavits and statements [18] counsel generally state that it was only after the second trial phase began that they learned about: (1) Richard Graffam's role in the MDL-721 litigation and or (2) his family ties with William Graffam and or (3) the economic relationship between David Indiano and William Graffam, through the firm of Jimenez, Graffam & Lausell.

Most moving defendants contend that even though they knew of the aforementioned relationships, it was not until recently that they were able to make the connection between these three (3) persons and the case. That is, they knew about David Indiano and William Graffam being members of the same firm but not that William Graffam and Richard Graffam were brothers; or that they did not know David Indiano worked with William Graffam; or that they knew that Richard Graffam was a law clerk with the undersigned but were unaware that he was working with the undersigned in the handling of this case.

Contrary to movants' position, we find that the overwhelming evidence leads to the inescapable conclusion that there has been a wealth of information available to these defendants since the very beginning of this litigation which should have alerted each and every party and its respective counsel as to *all* respects of these relationships.

Defendants nonetheless claim that their motion is made in good faith and that the delay in filing their motion, if any, is due to the fact that David Indiano was prosecuting cases on his own behalf and not that of the law firm. They further argue that they were never served with the individual complaints but merely with the master complaint and thus they could not have noticed that the

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[18] It is important to note that only 13 affidavits were submitted and therefore some moving defendants' counsel did not support the general petition for recusal.

"*Jiménez, Graffam & Lausell*" law firm was involved.[19] Defendants' implication that they lacked knowledge of the contents of the individual complaints because they may not have been served with them simply shows how far these attorneys will go to deny the obvious. The master complaint contains only allegations as to liability against all defendants in the litigation. It does not mention damages nor does it pray for any particular sum certain for damages. These can be found only in the individual complaints. Certainly, defendants had a duty to review these complaints to answer them, and prepare for discovery and trial.

Neither can defendants seriously argue that they were not aware that David Indiano was employed by Jimenez, Graffam & Lausell. The application for appointment to the PSC filed on February 20, 1987 (docket No. 32) was submitted precisely by the firm with the names of 3 proposed candidates which included Mr. Indiano, William Graffam, and Steve Lausell. Later on, his appointment to the PSC in Pretrial Order No. 2 issued on March 18, 1987 (docket No. 95) specifically listed him with the name of the firm. In the April 27, 1987 issue of the National Law Journal he appears as one of the PSC members followed by the name of the firm. The notice publishing Mr. Indiano becoming a member of the firm effective May 1, 1988 was published in English in 2 newspapers of general circulation in Puerto Rico.[20] His name on the service list of attorneys clearly designates the law firm.

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[19] All complaints have the firm's name. At least two were signed by William Graffam (87-272 and 87-273); others, which were signed by David Indiano, have the firm's name in the cover page (87-1676, 87-1677 and 87-1678); and there are others in which Jimenez, Graffam & Lausell *by* David Indiano appear as counsel of record (87-1733, 87-1734 and 87-1735).

[20] San Juan Star August 17, 1988 (Exh. J) and El Nuevo Día August 18, 1988 (Exh. K).

There are countless deposition transcripts where the appearance of "Jimenez, Graffam & Lausell by David Indiano" is noted in the front page [21] some of which date back to the fall of 1987 and many of which were precisely at the very offices of the firm.[22] Among those present during the taking of some of these depositions were counsel, and or members of their firms, who are now requesting recusal [23] including some who submitted supporting affidavits.[24]

Apart from the fact that certain affiants themselves or members of their firms were present during the taking of these depositions, these transcripts were filed with the Joint Document Depository where copies were available to all parties to this action.

In addition, contrary to certain defendants' position,[25] David Indiano issued correspondence on the Jimenez, Graffam & Lausell letterhead including matters exchanged between him and precisely some of the moving defendants, which were members of the Discovery Committee along with Mr. Indiano such as Michael Black, Carl Henlein

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[21] Exh. L to PSC's opposition.

[22] Exhibits L and S to PSC's opposition.

[23] C.A. Chavier Stevenson; Garcia & Gonzalez; Paxton & Seasongood; Deneber, Tuffley, Bocan, etc. and W. Douglas Smith for Honeywell.

[24] Rúa & Mercado; Anderson, Moss, Russo & Cohen; Brown, Todd & Heyburn; Wicker, Smith, Blomqvist, et al.; Cancio, Nadal & Rivera; Trias, Doval, Muños, et al. and Rivera, Tulla & Ferrer.

[25] At the *in chambers* conference Mr. Moss, in denying any prior knowledge of William Graffam or his law firm, went as far as saying "the only letterhead I have ever really received . . . has been from the PSC, . . . and I don't know David Indiano's firm." [Tr. 5] Yet, as pointed out in note 26 below, not only did he receive correspondence from Mr. Indiano with the firm's letterhead but Mr. Moss also addressed correspondence to him at the firm.

and Edward Moss, who in turn, addressed matters to him in care of Jimenez, Graffam & Lausell.[26]

The name William Graffam is by no means obscure in this jurisdiction. As already mentioned, two of the individual complaints filed on behalf of the firm were signed by William Graffam. Furthermore, in the application process for PSC membership, William Graffam submitted his name as one of the proposed candidates representing the firm and he also signed the pertinent motion.

He is a name-partner in a firm in this small jurisdiction where, mainly because of the language barrier, the attorneys that try cases in federal court are proportionately few. In addition, William Graffam has certainly become a well-known attorney because of his active participation as counsel in numerous cases in the U.S. District Court for Puerto Rico. He has also been court-appointed to several committees such as the First Circuit Judicial Conference of 1986 Planification Committee; in 1988, he was appointed by Hon. Gilberto Gierbolini to serve as part of a 4-member committee to review alleged unethical conduct by another attorney *In the matter of Jesus Hernandez Sanchez* Misc. 88-133 [27]; has was nominated by Hon. J. Torruella and appointed by Chief Judge Levin Campbell on November 18, 1988 to serve on the First Circuit Advisory Committee on Rules for a period of 2 years, and is also a law professor at the University of Puerto Rico School of Law. Furthermore, Hon. J. A. Fuste, a former member of the firm was appointed district court judge 5 years ago.

Richard Graffam, a law clerk to the undersigned since August 1986, has been part of the "Dupont Team", to-

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[26] See Exhs. M, N, O, Q, R and U to PSC's opposition.

[27] Two of the other four persons in the committee are members of firms participating in this trial Pedro Santa of O'Neill & Borges, and Marta Quiñones of Cancio, Nadal & Rivera, where Arturo Díaz is also employed.

gether with the rest of the Court' staff since this litigation first started. This particular fact has been the subject of at least one article in a national legal publication,[28] Two articles in the Caribbean Business, publication mention him by name. In the January 12, 1989 issue the article reads "Acosta gives much credit to his three clerks, Graffam Rodriguez, Vilma Vila and Pedro Malavet. . . Together, the group refines arguments before an order is issued. Sometimes they spend hours arguing a question, with each person acting as devil's advocate on a specific side. During an interview in which Graffam Rodriguez and Malavet were present, the judge deferred easily to them in conversation." (p. 17) The following week, on January 19, 1989, a picture of the undersigned with two the law clerks bore the following caption: "Judge Raymond Acosta . . . discusses the impending workload with his law clerks, Richard Graffam Rodriguez . . . and Pedro Malavet." (p. 27) In the January 8, 1989 Sunday edition of the San Juan Star at least three pictures of Richard Graffam, one in the front page, were published in a lengthy article reporting on the management of the *Dupont* litigation (his name was also mentioned several times).

The name Richard Graffam was specifically mentioned in the voir dire for both the first and second trial phases.[29]

Additionally, along with the other 2 law clerks at that time[30] and the U.S. Magistrate's law clerk, Richard Graffam regularly attended the monthly/periodic status conferences during approximately two years dealing with discovery and trial. During each of these conferences, Mr.

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[28] *See* The National Law Journal of January 11, 1988.

[29] The voir dire for the first phase lasted a total of 5 days and 7 days for the second phase. During both phases the names of all 3 law clerks were mentioned to each panel of venire persons an average of 3 to 5 times each day.

[30] Pedro Malavet and Vilma Vila.

Graffam and the other law clerks sat by the bench at the witness box facing the public area which was occupied by an average of 80 attorneys per conference. Throughout the first trial phase these 3 law clerks made regular appearances in Court and sat at a specially designated table in the well of the courtroom facing the attorneys with a sign which read "law clerks." During the second phase they were frequently present during voir dire and at the trial, always sitting in a specially designated area in the well of the courtroom facing counsel.

All of these facts, taken together, lead us to the obvious conc'usion that the 3 law clerks who participated in this litigation through at least last July were familiar faces to counsel and since they were only 3 throughout all this time their names could not have been so difficult to remember.

In the motion, the defendants briefly address the alleged conflict of Vilma Vila. It states that "[s]hortly after the conference on August 7, moving defendants further confirmed that the brother of Vilma Vila . . . has been a partner in the firm . . ." representing the San Juan Dupont Plaza Corporation. Yet, out of the 13 affidavits filed with the motion, only Eric Tulla and Adrian Mercado mention her name and then only to state that they recently learned of the relationship.

Given these facts, there is a distinct possibility that the defendants might have decided to conveniently ignore all these facts until, in their view, it best served their interests. Our position that the relationship between William and Richard Graffam and the MDL-721 litigation was commonly known to all counsel in these proceedings is further supported by the statements of Gary Bostwick, Esq. who represented defendants in the first trial phase and is further corroborated by Charles Cordero, Esq. also representing defendants in this litigation.

Given the particular system that most, if not all, of the defendants to this second phase trial have utilized to co-

ordinate their defense to this litigation, it would appear naive to believe that this information, which we find to be of common knowledge at least to local counsel, was not shared among all defense counsel. As a matter of fact, the issue was first presented jointly in chambers by defendants' liaison counsel and most defendants joined in a single petition.

Another factor which raises a doubt as to the good faith on defendants' part is their complete failure to mention Keith Graffam in their motion and in all but 1 affidavit [31] and even then, by passing. At the August 7, 1989 meeting, it was specifically mentioned that Keith Graffam was also a brother to William and Richard and also that he was employed with the firm of Charles Cordero who represents 2 defendants to these proceedings.[32] Defendants have tailored their arguments only to those facts which support their allegations of an appearance of impropriety that may give the impression that the Court might favor plaintiffs in this case.

Any possible argument that they were not aware of Keith Graffam are clearly unfounded. He attended numerous depositions taken in the discovery process of these proceedings and his appearance is noted on the front page of the deposition transcript.[33] Furthermore, he worked as a law clerk to Magistrate Arenas from 1985-86 at which time many of the local attorneys practicing in this district had an occasion to meet him.

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[31] Eric Tulla states in his affidavit that he heard at the August 7, 1989 conference that there is "a third Graffam brother who is also an attorney and who works with Charles Cordero, Esq." (para. 5).

[32] American International Insurance Co. of P.R. and Insurance Company of the State of Pennsylvania.

[33] See for instance the transcript cover/front pages for the following depositions submitted in Exh. G to the PSC's opposition:

Caribbean Woodwork—Francisco Santiago (8/13/87)
Multiplastics—Luis A. Marini Roig (10/19/87)
Fernandez & Gutierrez—Jose A. Hdz. Polo (10/16/87)
Caribbean Woodwork—Robert Hambleton (10/14/87)

Given the timing of defendants' request, it is not illogical to think that what has prompted this particular attack is nothing other than their desire to protract the litigation because of the possibility that the case has been proceeding faster and smoother than they had anticipated, but also because of some highly contested legal issues that have surfaced or have become ripe for the Court's ruling within the past weeks.

DUE PROCESS

With the distinct tone of an afterthought, movants tack on a single paragraph at the end of their memorandum stating that "[a]lthough unnecessary to reach the issue since recusal is clearly mandated by section 455, the Judge's refusal to disqualify himself in the present circumstances would run afoul of the due process clause of the United States Constitution." Defendants' Memorandum at 19. No specific citation to the Constitution is made and there is no discussion of what factual or procedural basis there is in this case for the alleged constitional violation. Rather, with a short string of case citations, parentheticals and quotations, movants speak elliptically of "nice, clear and true" balances and unfairness. This hardly suffices to present a constitutional question and, in any case, we need not address the merits of the matter, should these be somehow adequately presented, since we have disposed of the recusal issue on other grounds. It is text book law that federal courts are required to decide issues on *non*-constitutional grounds whenever possible.[34]

CONCLUSION

Half of the defendants in the current trial phase (representing less than 20 percent of all the defendants sued in this litigation) have requested that this judge and two

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[34] *See generally* Nowak, John E. *Constitutional Law* 2nd ed. pp. 93-95 (West 1983).

of his law clerks be disqualified, and that the case, now in its third year, be dissolved. Their reason: an alleged concern over a professed appearance of impropriety caused by the fact that these law clerks have brothers who work for law firms engaged in this litigation.

Movants try to step lightly around the fissures of their petition for recusal. The motion itself is procedurally flawed insofar as many of the defendants' counsel did not provide supporting affidavits. Be that as it may, the Court has seriously considered their claims in light of the relevant law, all the facts, the nature of the case and its timeliness. The sum of these parts weigh heavily against the draconian request made by moving defendants. It is further compounded by the extreme prejudice that would befall all other parties in this case, both plaintiffs and defendants, and the ponderous burden that would be thrown upon the judicial system were this enormous and costly case to begin anew. *See Simonson*, 425 F. Supp. 574, at 577 ("we are sensitive to the burdens which our recusal, and the consequent reassignment of the case, would place upon our colleagues in this district, particularly with the matter so close to trial.")

Finally, movants' assertion that they did not know about the underlying facts to their motion is not convincing and is undermined by the fact that they waited for the proceedings to be substantially advanced before they made their move. Even if we were to think that this was done within the "good faith zeal of advocacy . . . in the factual situation here presented by them, mandating disqualification would be nothing more than giving to these litigants a second opportunity to try a case before a different judge without their being entitled to that opportunity." *Miller Industries, Inc. v. Caterpillar Tractor Co.*, 516 F. Supp. 84, 89 (S.D. Ala. 1980). In the end, it seems clear that the fear expressed by the moving defendants is not for the safeguarding of the integrity of the Court or unfair bias in the proceedings, but rather over a trial

stratagem gone awry. This is plainly not enough to prevent the undersigned from continuing with the fair and speedy resolution of this trial.

Based on the foregoing, the Defendants' Motion for Disqualification, Recusal and Mistrial, docket No. 12237, is hereby denied.

The Court, having disposed of the issue of recusal by way of this Order, hereby finds that there is no need to continue this matter under a confidentality order. Accordingly, the following documents shall be UNSEALED:

1. Documents that were to remain confidential and to be viewed *only* by the parties and their counsel pursuant to our Court Margin Order No. 506, (Docket No. 12287, filed August 17, 1989);[35] including the transcript of the August 7, 1989 Hearing in Chambers.

2. Court Margin Order No. 511 (Docket No. 12388, filed August 22, 1989).

3. Documents regarding this issue filed thereafter.[36]

IT IS SO ORDERED.

San Juan, Puerto Rico, this 24th day of August, 1989.

/s/ Raymond L. Acosta
RAYMOND L. ACOSTA
United States District Judge

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[35] Docket Nos. 12143, (filed August 8, 1989); and 12233, 12234, 12235, 12236 and 12237 (filed August 14, 1989); and 12261, filed August 16, 1989.

[36] Allied Signal, et al. . . . (Docket No. 12323, filed August 17, 1989).

APPENDIX A

1. Aconi Constructors, Inc.
2. ADT Diversified Services, Inc.
3. Alexander & Alexander
4. Allied-Signal, Inc.
5. Amoco Fabrics & Fibers Co.
6. BASF Corp.
7. Crain Western, Inc.
8. Collins & Aikman Corp.
9. Honeywell, Inc.
10. Santa Fe Extruders, Inc.
11. Jack Lenor Larsen, Inc.
12. Foss Manufacturing, Inc.
13. Navan Carpets
14. Recticel Foam Corporation
15. Shelby-Williams, Inc.
16. Hytex Industries, Inc.
17. Johnson Controls
18. Dan River, Inc.
19. Dow Chemical Co.
20. Drexel Heritage
21. E.I. DuPont De Numours Co.
22. Firestone Tire & Rubber Co.
23. Forms & Surfaces, Inc.
24. H.B. Fuller Co.
25. H.B. Fuller Co. of Puerto Rico
26. Future Foam, Inc.
27. Glidden Industries of Puerto Rico
28. Goodyear Tire and Rubber Co.
29. Hufcor, Inc.
30. Knoll International (Scotfoam, General Felt)
31. Lamin-Art, Inc.
32. Laminating Services, Inc.
33. Lee Foam Products Co.
34. Maharan Fabric, Inc.
35. Olin Corp.
36. Otis Elevator Company

37. Union Carbide Corp.
38. Uniroyal, Inc.
39. Universal Security Advisors, Inc.
40. Wolf-Gordon

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Master File MDL-721

IN RE: SAN JUAN DUPONT PLAZA HOTEL FIRE LITIGATION

COURT MARGIN ORDER NO. 511

ORDER DENYING RECONSIDERATION OF MOTION SEEKING LEAVE TO REPLY TO MOTION FOR DISQUALIFICATION

Moving defendants have filed a Motion for Reconsideration of Denial of Leave to Reply to PSC Opposition to Defendants' Motion for Disqualification, Recusal and Mistrial (Docket No. 12369, filed August 21, 1989). They base their request on the fact that they did not have a copy of the transcript of the August 7, 1989 in chambers conference when they prepared their motion for disqualification and that the PSC allegedly distorted critical facts as to what transpired at the conference. If defendants did not have a copy available it is only because they failed to request one.[1] In addition, moving defendants attended the conference and were fully aware of what was stated there when they filed their motion a week later. Finally, the Court conducted the conference and has a copy of the transcript so that the facts are easily ascertained. Accordingly, the Court finds no merit in defendants shallow argument.

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[1] Although the transcript was kept confidential, this petition would not have been denied since they were privy to the conference, which, as a matter of fact, was held pursuant to their request. The PSC did petition for a copy and this was granted.

To the extent defendants wish this opportunity to further support their original request, they are reminded that given the nature of the allegations and precisely because this is a matter which should be disposed of at the earliest possible moment, defendants should have had their allegations ready for submission at the time of the conference in chambers or shortly thereafter, and it was exclusively in order to accommodate them that defendants were given a total of 7 days to file their allegations.[2] Further submissions would simply be a waste of precious time.

This Order shall be filed UNDER SEAL until further notice; the parties are to obtain copies and keep them confidential.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 22nd day of August, 1989.

/s/ Raymond L. Acosta
RAYMOND L. ACOSTA
United States District Judge

[2] The PSC had only 2 days to file its opposition.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

Master File MDL-721

IN RE: SAN JUAN DUPONT PLAZA HOTEL FIRE LITIGATION

COURT MARGIN ORDER NO. 509

Docket/Date	*Title of Motion*	*Ruling*
12235—8/14/89	Allied-Signal, INC., et al. & OTIS Supplemental Motion for Recess and Stay of Proceedings.	Denied.[1]
12294—8/17/89	PCS's Motion Requesting Leave to File Document Under Seal.	Denied.[2]
12204—8/17/89	ALLIED-SIGNAL, INC., et al. & OTIS ELEVATOR CO.'s Notice of Filing Under Seal.	Noted.[3]
12312—8/17/89	WOLF GORDON, INC's Motion for Leave to File Reply Brief or Oral Argument.	Denied.
12315—8/17/89	DEFENDANTS' Motion for Reconsideration of PTO 217 Re: Privilege/ Confidentiality of Joint Defense and Cooperation Agreements and for Finding that Defendant Signatories to the Cooperation Agreement have not Waived the Joint Defense, Work Product and Attorney-Client Privilege.	Denied.[4]

[1] This motion, filed under seal, failed to comply with any of the requirements of the cited statute.

[2] The PSC's Response to Wolf Gordon, Inc.'s Motion to Poll the Jury shall be unsealed and included in the Master File. *See* PSC's Notice of Filing Motion[s] Under Seal (Docket No. 12290, filed August 17, 1989).

[3] Motion for Leave to Reply to a PSC Opposition filed under seal was denied in open Court. *See* trial transcript of August 17, 1989.

[4] Defendants have not raised any new issues or arguments and their truncated and self-serving reading of the record and of our orders on this matter is misleading.

12316—8/17/89	DEFENDANTS' Motion for Reconsideration of PTO 217 Re: Privilege/ Confidentiality of Joint Defense and Cooperation Agreements and for a Finding that Defendant Signatories have not Waived Joint Defense, Work Product, or Attorney-Client Privileges.	Denied.[5]

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 18th day of August, 1989.

/s/ Raymond L. Acosta
RAYMOND L. ACOSTA
United States District Judge

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[5] Defendants' arguments are not new nor are they borne out by the clear record on this matter.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Master File MDL-721

IN RE: SAN JUAN DUPONT PLAZA HOTEL FIRE LITIGATION

COURT MARGIN ORDER NO. 494

Certain defendants'[1] Motion for a Recess and Stay of Proceedings, filed under seal on August 8, 1989,[2] is hereby ruled upon as follows:

(1) The request for a recess and stay of proceedings is DENIED;

(2) The PSC is to be furnished with a copy of the motion which must be treated as *confidential*;

(3) The request that the motion remain under seal is GRANTED.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 9th day of August, 1989.

/s/ Raymond L. Acosta
RAMOND L. ACOSTA
United States District Judge

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[1] Forty-one defendants are listed in an appendix to the motion as joining in the request for a recess and stay of proceedings.

[2] *See* Notice of Filing Under Seal (Docket No. 12143, filed August 8, 1989).

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

MDL-721

IN RE: SAN JUAN DUPONT PLAZA HOTEL FIRE LITIGATION

HEARING IN CHAMBERS

BE IT REMEMBERED that the above entitled action came on for hearing before the HONORABLE RAYMOND L. ACOSTA, sitting at Hato Rey, Puerto Rico, on the 7th day of August 1989.

All parties and their counsel present as before.

[2] (THE FOLLOWING HEARING WAS HELD IN CHAMBERS)

MR. DIAZ: My name is Arturo Diaz and I represent ADT and I will be addressing the Court.

I'm addressing the Court on behalf of the members of Defendants Trial Liaison Committee, and also on behalf of the defense.

Basically Your Honor, the defendants have gained some information recently, that in our view, presents a situation of considerab'e concern to us, and we feel that we should bring it to the attention of the Court as soon as possib'e. And as you probab'y are aware, because I to'd your law clerk that it dealt with possib'e violation of 28 U.S.C. 455.

The situation is basically as follows: Your law clerk, Mr. Richard Graffam, is the brother of Mr. William Graffam. Mr. William Graffam is a named partner in the law firm of Jimenez, Graffam and Lausell. And Mr. Wil-

liam Graffam, we believe, is a partner of Mr. David Indiano in the law firm. We also believe that the law firm of Jimenez, Graffam and Lausell, including Mr. William Graffam, are attorneys for some plaintiffs in this case, and as such they have a considerable interest in the outcome of the case.

THE COURT: Interest?

MR. DIAZ: In the outcome of the case.

[3] As Your Honor knows Mr. Richard Graffam has been actively participating in this, as law clerk in this case. More so, we say the last two or three weeks perhaps when Mr. Malavet left. We don't know to what extent, if any, Your Honor was aware of this situation. But we feel that that, if these facts are correct, we feel that there is a problem and there is a possible violation of Section 455 of Title 28.

This is a very uncomfortably situation for us to present this matter to you, but we feel that if we are, as we should represent adequately our clients and responsibly, we feel that we have to address this issue and that we have to bring it to Your Honor's attention. Now, once we became aware of these facts, this has been the object of discussion—

THE COURT: Which facts did you become aware of specifically? You knew Graffam was the clerk.

MR. DIAZ: We knew that Richard Graffam was the clerk and he had participated actively in the case. Some people in the defendants group knew that Richard Graffam had a brother by the name of William Graffam that was a partner in the law firm of Jimenez, Graffam and Lausell. What I think nobody knew is, and people, different defendants knew, knew different things but I think nobody knew that the law firm and Mr. William Graffam had an interest in the outcome of the case, a significant financial interest in the outcome of this case.

MR. MASSERY: More important most of the defendants [4] counsel, in fact the vast majority, including myself, had no idea that there was any relationship between

them. I have never even seen Mr. Indiano's letterhead, I've seen some early on, references to his law firm, but I have never seen the letterhead of that firm and I had no idea that there was a relationship between the courtroom clerk here and Mr. Indiano's partner until I returned last week; nor did my partner Mr. Cooley.

I think that's the case of the vast majority of the defendants in this case. In fact we did take a polling of the defendants of the case and there were perhaps no more than three, that I saw the hands, that even knew that there was a relationship.

THE COURT: It seems to me that I recall Mr. Graffam himself coming to court on at least two occasions that I recall.

MR. MOSS: Which Mr. Graffam?

THE COURT: William Graffam.

MR. MOSS: If I may. I don't know William Graffam to this day. The name is the name I've heard only in the context of the last seven to ten days. In the contents of this, Your Honor. And I have learned that William Graffam is Richard's brother. I'm assuming they are brothers. I don't know that, but that's the basis of what is coming here, has come into this courtroom and sat at counsel's table. This effort, what this effort is this morning is to make Your Honor aware that this is the first available time information has come to our possession. [5] Some of us are brand new, insofar as this information, like Mr. Massery the only letterhead I have ever really received, Wendell included, has been from the PSC, and I don't know William Graffam and I don't know David Indiano's firm.

I've spoken to almost all of our counsel that practice here in Puerto Rico. And without exception none of them have known—several of them have known of this, and I think this becomes unimportant, but for the moment to help Your Honor so that we can make as full a disclosure to you and you have the same facts that we do at this point. There are two distinct areas of people that knew.

Some knew there were two Graffams, but never realized they were brothers. That's one thing.

THE COURT: Are these local attorneys?

MR. MOSS: Yes, sir.

THE COURT: Graffam is not—

MR. MOSS: Is not a Hispanic name.

THE COURT: It's not Perez, it's not Gonzalez.

MR. MOSS: Agreed.

THE COURT: In fact, Graffam the only time in my sixty-four years on earth is the first time that I heard that name, and specially in Puerto Rico.

MR. MOSS: But what we're here is, two versions is that they didn't know that they were brothers. The other is that there was, and these are only a few that had the knowledge, and [6] I think Mr. Diaz can obviously speak for himself. Mr. Diaz was certain that Mr. Indiano had removed himself from participation with his law firm and was basically involved in the PSC in his own capacity. That there was not a relationship that is an economic interest on behalf of his brother.

Indeed, the first time he saw his brother, that's what alerted him, was when his brother came into the well and I think he will tell you about the conversation that he had because he went and asked his brother what are you doing here and I shouldn't speak to him and—

THE COURT: Which brother said what to whom?

MR. DIAZ: When I saw William Graffam in the court I became concerned. The first time that I honestly can tell you that I became concerned and I talked to him. And I said what are you doing here, and then we had a conversation and he told me that they had an interest in the case, that the law firm has given support to the PSC. That they miss Mr. Indiano because he's out of the law firm and, of course, that makes it difficult for them but that they hopefully will make it up economically eventually.

THE COURT: You mean David Indiano? By the way where is he?

MR. GAUTHIER: He went upstairs. He's not here right now.

MR. DIAZ: David is a partner of William Graffam.

[7] MR. NACHMAN: He hasn't shown up this morning.

MR. MOSS: One of the things that underscores everything that we're saying is that there was a reaction by those that knew of a relationship, that this cannot be because if it was there would have been a disclosure by Richard Graffam or the brother.

THE COURT: But I never heard that David Indiano is separate and apart, at least I never thought about it, from Jimenez, Graffam and Lausell.

MR. MOSS: I'm only suggesting what people—I couldn't tell you.

THE COURT: I always assumed he was part of that firm.

MR. MOSS: I don't have the local phone book and all I see is the PSC letterheads. I never met David prior to this and I always thought that he was sole practitioner, but again I didn't do anything to check that he was or not. Because I assumed that if there was this relationship after the fact there would have been a disclosure. I met with David a number of times, in pretrials and things and there has never been a disclosure and that is not by way of criticism at this point or not, it's simply a fact.

MR. GAUTHIER: I wonder why the defendants haven't disclosed the Graffam that is working on the defense side.

MR. MOSS: I don't know what you're talking about.

MR. KEMP: Keith Graffam.

[8] MR. GAUTHIER: He's employed by Charles Cordero and has worked on this case.

MR. MOSS: I can't answer that, number one. Charlie Cordero represents the hotel, I think.

MR. GAUTHIER: A defendant, which you have an agreement with.

MR. MOSS: It may be. It may be. Charlie Cordero and William—what is this other Graffam?

MR. GAUTHIER: Keith.

MR. MOSS: Owe us a disclosure. I will get back to the same answer.

In any event, Your Honor, what we have, what the defendants have, that we are speaking about, which all of them have done, as soon as we realized this we have attempted to conduct an investigation as best we can, so that we can bring you the facts that we have available today.

We have retained independent and outside counsel. We have retained Professor Hazard at Yale. Unfortunately, he's in Hawaii at the ABA, he will be returning on Tuesday or Wednesday, but we felt that it was incumbent upon us, as officers of the court, to bring this information to Your Honor's attention, in a manner such as this, as quickly as we can.

THE COURT: Well, what is the bottom line, what you're telling me, as far as the defendants are concerned? That I should be bumped from the case?

[9] MR. MOSS: Your Honor, we are not presenting a—

THE COURT: I'm asking.

MR. MOSS: We are not.

THE COURT: I can't think of anything.

MR. MOSS: Judge.

THE COURT: I have my obligation to continue.

MR. MOSS: We are not prepared, if it please Your Honor to give you a bottom line today because we found it so significant, at least from our way of thinking that, number one, we know that the Court wants to know about it, would certainly want to know about our feelings.

Secondly, we found it so significant that we retained counsel so that we can retain our objectivity and pass that on to Your Honor. We will have a bottom line for

Your Honor, but we don't have it this morning, with all due respect.

MR. KEMP: Can we get the record clear, you're making a representation that within the last week the defense attorneys in that courtroom just found out about this fact within the last week?

MR. MOSS: You've misstated—

MR. KEMP: I'm asking a question.

MR. MOSS: Your Honor heard what we said, there have been different levels of information. And we, as candid as we can, there have been some people that well —there is no sense going over it, I will if Your Honor wants to, but I can speak [10] for myself and tell you that's correct, Mr. Kemp.

THE COURT: I don't think there is any question about you personally Mr. Moss. And I think we have to look at it collectively. We can't say I didn't know and I didn't know, but fourteen others knew. I think it's among yourselves, if there is no other thing than the law of nature by the way you know this fellow.

MR. MOSS: Is Mr. Kemp suggesting a waiver, that there is an issue of waiver?

MR. KEMP: I just want to know the facts. You come in and you don't know that Indiano is not part of the law firm, you pick up a Martindale, Hubbard—

MR. MOSS: You're right and when we met you could have told me. The point I'm making Your Honor—

THE COURT: Anyway, we're not going to go into this kind of argument. I think what we're after is the solid facts. The interpretations of how to deal with the facts.

MR. KLEINBERG: The knowledge is shared in terms of time. There are fifty lead counsel, probably got fifty different times as to when people became aware of all the facts. I for example did not learn until Thursday or Friday that the brother had appeared in the well because I didn't know who the brother was, I still don't know who he is. But there are different ranges of facts.

The question is out of, there are eighty some defendants, everyone is entitled to their own [11] obvious consideration.

I think one immediate bottom line, if you would, without being the ultimate bottom line is that until the matter is sorted out, they're ought to be at least some insulation from today on of the clerk from the continuation in the case. That seems to be the absolute minimum that would be required until the defendants and others are able to lay before the Court the full scope of it in terms of what appropriate remedies might be taken.

THE COURT: Well, insofar as that aspect is concerned, I don't know if you are aware of the fact that, I think I mentioned in the publication, it's kind of a publication, we operate on a team basis and although I have the ultimate discretion, we discuss it back and forth, strategies and whatever. And so what I'm saying is that he can be over ridden by me and also argumentations against his point of view in these brain sessions that we have.

And also the fact that, you know, Pedro has left who was really the leading Dupont clerk. And Vilma was out and just this past week or so Richard has come in. And basically, mostly as a gopher, get me whatever they're referring to, with pretrial such and such, point out, quickly point out the provision for me.

So that I'm mentioning this because I don't know what else I can do, any suggestions that you have with respect [12] to this. I think it's kind of insulate—well, of course this is before this situation that you're bringing to my attention.

MR. KLEINBERG: Your Honor—

THE COURT: Outside of dismissing—

MR. KLEINBERG: Your Honor, I can tell from my own experience I served as law clerk for the Southern District of New York for two years that the insulation or isolation precisely that, that the clerk has absolutely no contact at all with the case in terms of discussion or

other acts. It doesn't fit in the courtroom and doesn't participate in the case. I mean that I think based on my own experience as having been through that is what insulation and isolation means in the contact of the clerk.

And I know that to focus a burden on the rest of the staff, but as a minimum that is what the statute and the cases seem to call for. I don't know the workings of Your Honor's chambers, but I'm sure they're not different from the judge that I worked with. But there was before Mr. Malavet who was the lead clerk and now that he's has left the perception was that Mr. Graffam has taken over.

MR. MOSS: This obviously is not, understandably, a potential undue burden on Vilma. And that's why we just simply needed to bare our souls to Your Honor this morning, as Your Honor needs to, we need to contemplate what suggestions we can make to the Court in addition to to what Mr. Kleinberg has [13] suggested. And again that's the reason that we were busy trying a lawsuit as everybody else here. Retain independent counsel to advise us.

MR. KEMP: Maybe it might be good for the local attorneys to file affidavits that they didn't know about this until last week.

MR. MOSS: I don't—it would be very interesting for you to file an affidavit why you didn't disclose it and why David didn't disclose it.

MR. DIAZ: It's very strange for Mr. Kemp, I've been an attorney here for twenty years and I can tell you that never did I dream that the law firm had a financial interest in this case. Even though I knew that they were partners and even though I thought they were Indiano's cases before he started, when he first started in the law firm.

MR. NACHMAN: Did you ever read the complaint, with the firm name on them?

MR. DIAZ: I was never served with the individual complaint I was served with the master complaint.

MR. NACHMAN: Yes, you were. They were available to you all the time.

MR. MOSS: We get back to, yes, it was available. We were available to you, Harvey, and to you, Wendell, and specially you, Will, because we dealt so much on Otis; simply make a disclosure, this kind of reparte.

[14] MR. GAUTHIER: What about Keith Graffam?

MR. MOSS: Not asked about—

MR. NACHMAN: He was a member of the—

MR. GAUTHIER: For the record it sounds to me like sour grapes.

MR. MOSS: What is your suggestion?

MR. GAUTHIER: You wake up and—

MR. MOSS: It may sound like sour grapes to you but . . .

THE COURT: I think we can suspend with the evaluations, the sour grapes, et cetera, that doesn't help in any way to the issue at hand. Motivation. We're not going to get into that.

Obviously, you have a legal leg to stand on, that you're going to assert and that's what we're going to operate on. Whether it's a good motive or bad motive I think is immaterial.

MR. MASSERY: For many of the defendants we do have a duty to inform the Court under the code of professional ethics. I don't have anything to do but a duty, whatever, somebody else didn't tell me it's not relevant in terms of my position. I have a duty to come to the Court, and I think the Court is aware that there is case law that the person that becomes aware of a problem like that is sanctioned for his failure to perform that duty, even though he has nothing to do with the wrongdoing. I simply don't know, that there are a lot of Graffams on the [15] island.

I wasn't aware that Graffam was not a common name in Puerto Rico and there are a lot of us that are in the same position. It's not our experience I would go across the island and know that Graffam is not a common name.

Yes, I have absolutely seen David Indiano firm name. I knew that David Indiano was an associate.

MR. NACHMAN: He's been a partner for almost a year.

MR. MASSERY: That's a fact that I wasn't aware of.

THE COURT: These are facts, facts are facts and they will be there. I couldn't swear what his status was vis-a-vis the firm, during this trial.

MR. MASSERY: There may have been individuals that have some knowledge and depending upon the degree of knowledge I, for one, my client did not. And I have a duty under the code of professional responsibility to be here and I think that if I were in any other position, and I'm here very reluctantly, I can tell you, and I think that other counsel will tell you that, I'm not here because I would like to be here. It is my view that in fact as much as—that the case is just going just fine and I would want the case to continue just as it is. But I have a duty and I am here to fullfil that duty on the record.

THE COURT: Any other comments? So what happens now, you're going to submit something in writing, is that it?

MR. MOSS: We will be submitting our position and [16] suggestions to the Court, Your Honor. If we are in a position to have that done today we would. Professor Hazard will not, I think, be available until either Wednesday or Thursday.

MR. HENLEIN: Thursday or Friday. This week. I think he's due back Thursday. Maybe we'll talk to him on Friday.

THE COURT: And then of course in the meantime you'll be setting up the facts with respect to his relationship.

MR. HENLEIN: We learned a lot of new things, that David Indiano has been a partner for at least a year. For nearly a year, whatever the record will show. That's what we would like to get wrapped around because kind of, like a seven men and the elephant. We all know some-

thing different about the elephant, when we're trying to discovers the entire elephant.

MR. MOSS: Is there an issue that they are brothers?

MR. KEMP: Not that I know.

MR. NACHMAN: Not as far as I know.

MR. MOSS: Well, if you're not sure you can imagine—

MR. NACHMAN: I'm quite sure.

MR. GAUTHIER: And so is Keith. And that Bill Graffam made an appearance in court in one of the very first hearings.

MR. MOSS: I don't doubt that.

MR. MASSERY: Was it during opening statements?

MR. GAUTHIER: Norman Kleinberg, Mary Hulett and Mr. Fish worked with David Indiano on a daily basis in Phase One.

MR. MOSS: And that's the point we're making, did [17] anyone tell us.

MR. KLEINBERG: I certainly didn't know, if you're suggesting—

THE COURT: Did Mary know?

MR. NACHMAN: Mary has local counsel by the name of Frank Polo.

MR. MOSS: Well—

MR. QUILICHINNI: I know Graffam and I didn't remember seeing him until the opening statements. Before that I never saw William Graffam in this court. I wasn't at any single status conference and I was brought into this case at different times.

MR. MOSS: Some of us wouldn't know him if he walked in the room right now, wouldn't recognize him.

THE COURT: But I don't know, I have known for a long time and that not mentioning at least to others. I would find that a little odd.

MR. MOSS: What is that, sir. If there are people—

THE COURT: Yes, because quite a number of you, and it would seem that one or two or some would know this all along, and now it comes up because you who and

likely so. I don't doubt for a moment that you didn't it took a long time to trickle down.

MR. MASSERY: There is two things: One is that Mr. Graffam showed up, for the first time, in opening statements. [18] And two, Mr. Graffam, your clerk, became more active in the case when Mr. Malavet left. And I think those two are additional things. I understand that the relationship continues to exist but certainly those are things that bring it to mind, that the appearance of Mr. Graffam, Mr. Indiano at the opening statement in your courtroom.

MR. NACHMAN: As I recall Mr. Graffam was present at every pretrial, even those conducted by the magistrate.

MR. MOSS: Are you suggesting that there is a waiver?

MR. NACHMAN: I'm not suggesting anything.

MR. MOSS: I think there are, as Your Honor made the observation, there are different gradiations of knowledge. I don't think that any defendant counsel had the knowledge that we have presented to you today at any stage until recently. And recently, I'm talking about the last two weeks or the last week.

MR. KEMP: I take issue with that.

MR. MOSS: You may, gentlemen. The Court asked, I'm only telling you what we heard and obviously this is something that we have not treated idlely. It's been a matter of the greatest concern to all of us. It has been a very difficult weekend for all of us to come here and raise this, I promise you, Judge.

MR. DIAZ: It's not easy, that's for sure.

MR. MOSS: And the reason we have done it is, we have [19] done it through the liaison committee because we think that is the appropriate vehicle that was set up by the Court. This hasn't been pleasant, this isn't fun. But on the other hand it wouldn't be pleasant if down the

road I sat down here and had to tell my client this is something that I became aware of and didn't raise with the Court.

THE COURT: Did you check 455 out.

MR. MOSS: 455, yes, sir.

THE COURT: I haven't had an opportunity to look at it.

MR. KLEINBERG: I know from a prior life 455 mandates disqualification of, this is written in terms of the court, as against the law clerk. When there is a relationship, for example, if Your Honor's brother was the brother of David Indiano. I believe 455 would absolutely require Your Honor not to participate.

What the cases hold is that the law clerks are treated the same as the court. In other words, the law clerks are held to the same standard. I don't know whether they give out any more but, and that the relationship it's a question of relationship with the party that has an interest. And the waiver issue, if there is a waiver issue, goes to types of remedies that might be available, doesn't go to the existence of the problem or of the relationship between the clerk and a party.

Now if there is some other brother that has a job, [20] too and whoever Cordero represents is still in the case, that's another factor. It isn't necessarily dependent on whose side the relationship is. It's sort of an enlightment in that regard; are you related to a party. We're not suggesting that there is an impropriety. It's the same standard that Your Honor has held to. The case law is quite clear. We've gone that far, and obviously we wouldn't come in here without being confident that what we're advising the Court, at least at this moment we have competence supported by the cases under the statute. So that really is our position and I feel better now than I did coming in here. We made our disclosure. I understand the position that Mr. Kemp and the PSC has taken so—

THE COURT: Okay. You figure by Friday, possibly, that something—

MR. MOSS: Your Honor, by Friday or Monday, Professor Hazard—

THE COURT: Monday.

MR. HENLEIN: We understand he'll be back Thursday and we can talk with him on Friday and put something together over the weekend, if that is acceptable with Your Honor.

THE COURT: Yes.

MR. MOSS: If he wasn't in Hawaii then we could do it before but the hour difference.

[21] THE COURT: My only pause at this moment, I don't know if I should mention it, is whether we should continue. In other words, this becomes a point—I don't know. I have to think about it.

MR. MOSS: I agree. So our position is entirely clear and I think it is to advise during this session, to advise the Court it is done without waiving any defendants' rights to make appropriate suggestions to the Court as the relief that we deem is warranted. We don't want this to be construed as a waiver.

THE COURT: Okay. How about a response? Monday; how long.

MR. GAUTHIER: This is only—

MR. NACHMAN: They file Friday, if they file, we will want Monday morning.

THE COURT: They will probably do it Monday morning. Wednesday.

MR. NACHMAN: Wednesday morning is fine.

THE COURT: Being realistic, we'll make it Monday morning for defendant and Wednesday for plaintiffs.

MR. KLEINBERG: May we seal the transcript?

THE COURT: You want to seal it, Arthur.

MR. MOSS: And can all counsel be, can all of us be admonished that it is not going to be shared with anyone other than counsel or client?

THE COURT: So ordered.

* * * *

APPENDIX K

COUNSEL FOR ALLIED-SIGNAL INC., AMOCO FABRICS & FIBERS COMPANY, BASF CORPORATION, THE DOW CHEMICAL COMPANY, E. I. DU PONT DE NEMOURS & COMPANY, THE FIRESTONE TIRE & RUBBER COMPANY, H. B. FULLER COMPANY, H. B. FULLER COMPANY PUERTO RICO, FUTURE FOAM, INC., THE GOODYEAR TIRE & RUBBER COMPANY, KNOLL INTERNATIONAL HOLDINGS, INC. (includes GENERAL FELT INDUSTRIES and SCOTFOAM CORPORATION), OLIN CORPORATION, PPG INDUSTRIES, INC., QUANTUM CHEMICAL CORPORATION (USI DIVISION), SEALED AIR CORPORATION, UNION CARBIDE CORPORATION, and UNIROYAL PLASTICS COMPANY, INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Master File MDL-721

IN RE: SAN JUAN DUPONT PLAZA HOTEL FIRE LITIGATION

THIS DOCUMENT RELATES TO: "ALL CASES"

DECLARATION OF CARL ARTHUR HENLEIN

Declarant, CARL ARTHUR HENLEIN, being of legal age, married, and a resident of Louisville, Kentucky, being first duly sworn, states:

1. I am a partner in the Louisville, Kentucky law firm of Brown, Todd & Heyburn. I serve as counsel for each of the above-named defendants in this litigation.

2. Since entering my initial appearance as counsel in this litigation in December, 1987, I have served in a variety of capacities on committees authorized and appointed by this Court. In particular, since January, 1988, I have served as a member of the Joint Discovery Committee established by District Court Pretrial Order No. 29, entered on January 18, 1988. In that capacity, I worked with each of the other members of the Discovery Committee, including Mr. David C. Indiano, who is now a partner in the San Juan, Puerto Rico law firm of Jimenez, Graffam & Lausell. Messrs. William Kemp and Francisco M. Troncoso, members of the Plaintiffs' Steering Committee ("PSC") also served with me on the Discovery Committee.

3. Pursuant to District Court Pretrial Order No. 143, I also served as Trial Liaison Counsel for the first phase of trial in this action nominated the "Corporate Veil" trial, on behalf of the non-San Juan DuPont Plaza Hotel defendants. In that capacity, I served with Messrs. Troncoso and Kemp, who served on behalf of the plaintiffs and the PSC. Pursuant to the District Court's Pretrial Order No. 185, I also served as Trial Liaison Counsel for the second phase of this trial, nominated the "Products and Services" trial which is now in progress. In that capacity, I served as Trial Liaison Counsel along with Messrs. Wendell Gauthier, William Kemp and Francisco Troncoso, repsentatives of the Plaintiffs' Steering Committee.

4. Throughout my participation in the pretrial and trial phases of this litigation, I have attended dozens of conferences, meetings, hearings, and informal gatherings of counsel at which various members of the Plaintiffs' Steering Committee, including David Indiano, Wendell Gauthier, William Kemp, Francisco Troncoso, and others, participated.

5. With the issuance of the District Court's Pretrial Order No. 180, requiring pretrial proceedings and court-ordered conferences and hearings throughout the month

of June, I traveled to San Juan, Puerto Rico on June 2, 1989, along with members of my firm and trial support staff, to prepare for and undertake the trial of this second phase of the litigation. During the month of June, and, following commencement of trial on June 27, 1989, during the conduct of the trial to date, I have had regular and frequent contact with Messrs. Indiano, Troncoso, Kemp, and Gauthier.

6. On or about July 20 or 21, 1989, at a meeting of defense counsel I was advised by counsel for other defendants that Mr. Richard Graffam, law clerk to Judge Raymond L. Acosta, is the brother of Mr. William Graffam, a partner in the law firm of Jimenez, Graffam & Lausell of San Juan, Puerto Rico, of which Mr. David Indiano is a member. Prior to the beginning of trial on June 27, 1989, I do not recall having ever met Mr. Richard Graffam, Judge Acosta's law clerk, I had never been advised of his participation in this proceeding, and I had never had any opportunity to discuss this litigation or his role in it with him or any other representative of the Court.

7. At no time during my participation in this litigation did Mr. David Indiano or any of his colleagues on the Plaintiffs' Steering Committee or any representative of the Court advise me of the relationship between Mr. Indiano's partner, Mr. William Graffam, and the Judge Acosta's law clerk, Mr. Richard Graffam.

8. Since the inception of the trial in this phase of the litigation, I have observed Mr. Richard Graffam's attendance in the area reserved for law clerks near Judge Acosta. I have observed Mr. Richard Graffam, on numerous occasions, consult and assist Judge Acosta with his rulings on motions and evidentiary matters pending before the Court.

9. On August 7, 1989, as a member of the Trial Liaison Committee appointed by the Court, I met with Judge Acosta in the Court's chamber. The issue of Mr. Richard

Graffam's participation in this litigation was raised by defense counsel at that time. Judge Acosta acknowledged that Mr. Richard Graffam was the brother of Mr. William Graffam and that he was a participant in the judicial proceedings, the drafting of orders and the strategy sessions of the Court in this litigation.

10. I was unaware of the relationship between Mr. Richard Graffam, Mr. William Graffam and Mr. David Indiano until it was made known to me on July 27, 1989. I was advised at a later time that in addition to the relationship between the Graffams and Mr. Indiano, William Graffam has appeared in Court in behalf of the plaintiffs during this trial.

11. As counsel for the defendants listed above, I can report that defendants I represent believe that the relationship between Mr. Richard Graffam, Mr. William Graffam and Mr. David Indiano places in issue factors from which the Court's impartiality might reasonably be questioned.

I declare under penalty of perjury that the foregoing is true and correct, pursuant to 28 U.S.C. Sec. 1746.

In San Juan, Puerto Rico, this 11th day of August, 1989.

/s/ Carl Arthur Henlein
CARL ARTHUR HENLEIN

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Master File MDL-721

IN RE: SAN JUAN DUPONT PLAZA FIRE LITIGATION

SWORN STATEMENT

I, ADRIAN MERCADO, of legal age, married, Attorney at law and resident of Carolina, Puerto Rico, state as follows:

1. That my personal circumstances are those mentioned above.

2. That I have been practicing law in Puerto Rico since 1963. That I knew, before this case started about the existence of the law firm Jiménez, Graffam & Lausell. That I personally know Messrs Jiménez and Lausell. I dont know Mr. Graffam.

3. That when the case started, I met Mr. Indiano of the PSC, probably in some deposition or Status Conference. I did not know Mr. Indiano before this case.

4. That after I entered this case somebody told me Mr. Indiano worked for Jiménez, Graffam & Lausell. That I assumed he was on leave from that law firm, but really never gave it a thought as it seemed at the time irrelevant.

5. That I don't know the law clerk Graffam and the first time I heard his name was during Jury selection.

6. That around the beginning of August somebody told me the law clerk Graffam was a brother of Graffam, the partner at Jiménez, Graffam & Lausell.

7. That on the first week of August at a meeting of Defendant Counsel I learned that Mr. Indiano was a partner of Mr. Graffam, the partner at Jiménez, Graffam & Lausell.

8. That I don't know the law clerk Vilma Vilá and the first time I heard her name was during the Jury selection.

9. That this week I learned that Vilma Vilá was the sister of an attorney member of the Fiddler, González & Rodríguez law firm.

10. That in my opinion this creates an intolerable conflict of interest for Mr. Graffam and Miss Vilá, the law clerks, under the local "appearance of conflict" ethics statute.

In San Juan, Puerto Rico, this 11th day of August, 1989.

/s/ Adrian Mercado
ADRIAN MERCADO

Affidavit Number: 183

Sworn and subscribed to before me by Adrián Mercado, of the personal circumstances above stated, whom I known personally at San Juan, Puerto Rico, this 11th of August, 1989.

[SEAL]

/s/ [ILLEGIBLE]
Notary Public

COUNSEL FOR OTIS ELEVATOR CO.:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Master File MDL-721

IN RE: SAN JUAN DUPONT PLAZA HOTEL FIRE LITIGATION

THIS DOCUMENT RELATES TO: ALL CASES

DECLARATION OF EDWARD A. MOSS

I, EDWARD A. MOSS, an attorney, of legal age, resident of Miami, County of Dade, State of Florida, state as follows:

1. I am lead counsel for OTIS ELEVATOR CO., and defendant in this litigation.

2. My first knowledge of any relationship between Richard Graffam (the Court's law clerk) and William Graffam (the law clerk's brother and partner of PSC member David Indiano) and David Indiano was on or about July 17th. At that time I heard a rumor that they were cousins or possibly nephew and uncle.

3. Prior to that date, not only was I unaware of any relationship, but I possessed absolutely no knowledge of one William Graffam, who I have since learned is the law clerk's brother and a law partner of PSC member David Indiano.

4. Indeed my first knowledge of Richard Graffam by name was during the jury selection in this case when the Court read Mr. Graffam's name to the perspective jurors as being a member of the Court's staff and inquiring if any perspective juror knew Richard Graffam.

5. At no time prior to July 20th was I aware David Indiano was a law partner of William Graffam.

6. On or about July 20 or 21st, I became aware that Richard and William Graffam were brothers. Not having been involved in this litigation from its commencement (my client, Otis Elevator Co., was first served with process on October 9, 1987,) I wanted to be certain an "on the record" disclosure of the Graffam relationship had not previously been made. I therefore ordered a search be made of the Court files to determine if such disclosure had been made prior to my becoming involved in this litigation. Not only were the Court files searched, but I questioned numerous defense counsel (both Puerto Rican and stateside) to determine if any of them were aware of such disclosure having been made. No defense counsel questioned had any knowledge of such disclosure.

7. At no time prior to August 3, 1989, was I aware William Graffam had a financial interest in the outcome of this litigation. I have since learned that he and his law firm have such interest.

8. On August 3 or 4th, for the first time, I learned William Graffam participated in the PSC's case by being present at Plaintiffs' counsel table during the course of this trial.

9. Throughout the course of my involvement in this litigation, including and through today, neither David Indiano nor any other member of the PSC has ever, in any manner, even suggested, let alone disclosed to me the existence of the relationship described herein and which is the subject of the Motion giving rise to this Affidavit. This failure to disclose, I suggest, is of particular significance because of my having served with several PSC members, including David Indiano, on the Court appointed Discovery Committee. As members of this Committee we regularly met throughout the discovery phase

of this litigation, a period in excess of one year. Additionally, I had regular contact with several other PSC members throughout this period and again, no mention whatsoever was made of the relationship of which, at all relevant times, David Indiano and the other PSC members were aware.

10. Since the commencement of the current phase of this trial I have observed in open court apparent significant involvement by Richard Graffam in providing assistance to this Court, including but not limited to consultation with the Court while the Court was considering motions or objections raised during trial by various counsel.

11. Once gaining knowledge of the above facts I participated as a member of the Court appointed Defendants' Liaison Committee, in a conference with Judge Acosta in his Chambers on Monday morning, August 7, 1989. During this conference Defendant's counsel disclosed, on the record, to the Court the facts which the Committee members had recently gained knowledge of and which are set out in paragraphs 2 through 9 above.

12. At the August 7th conference Judge Acosta acknowledged the existence of the Graffam brother relationship and that Richard Graffam had actively participated in this case as a member of the Court's team or as a participant in the Court's team approach to this case.

12. On Tuesday, August 8, I observed Richard Graffam seated in the Courtroom in the area designated by the Court to be occupied by the Court's law clerks. During this time I observed Richard Graffam conferring with the Court out of the hearing of all counsel. Considering the disclosures made to the Court in Chambers on August 7, 1989, the appearance of impropriety continues to persist causing my client and I to believe the Court's impartiality might reasonably be questioned.

FURTHER AFFIANT SAITH NOUGHT.

DATED this 10th day of August, 1989.

/s/ Edward A. Moss
EDWARD A. MOSS

DECLARATION

COMES NOW ERIC A. TULLA, of legal age, married, attorney-at law and resident of Guaynabo, Puerto Rico and hereby states under penalty of perjury as follows:

1. I am counsel for Otis Elevator Company in the San Juan Dupont Plaza fire litigation.

2. Approximately three weeks ago I was asked by my co-counsel, Edward Moss, Esq., whether there was any relation between the Court's law clerk, Richard Graffam and William Graffam, Esq., a partner in the Jiménez, Graffam & Lausell law firm in San Juan. At that time, I was unaware of any family relationship between the two, nor was I aware at that time that the Jiménez, Graffam & Lausell law firm had an economic interest for potential legal fees in this case, that they represented plaintiffs in this case or that David Indiano was working for that firm in his position as a member of the Plaintiffs' Steering Committee.

3. After making inquiries, on or about July 20, 1989 I was informed that the two Graffams are indeed brothers.

4. I do not know the Graffam brothers socially and previously did not know of their family relationship. I believe I met William Graffam, Esq. in connection with the preparation for the First Circuit Judicial Conference held in San Juan, Puerto Rico several years ago. I do not recall having otherwise dealt with William Graffam socially or professionally. I did not meet Richard Graffam until his participation as a law clerk in the Dupont Plaza litigation during the second phase of the trial, although I must have heard his name or perhaps seen him during the first phase of the trial. I do not know him socially and my contacts with Richard Graffam have been limited exclusively to official contacts pertaining to the on-going litigation. For example, on the afternoon of July 14, 1989, together with David Indiano,

Esq. and Will Kemp, Esq., both of the PSC, I met with Richard Graffam to tender him courtesy copies of pending motions involving a dispute between Otis and the PSC regarding stipulated uncontested facts, and the merits of the motions were outlined for the law clerk. At that time I was unaware of the relationship between the two Graffams and of the relationship between William Graffam, Esq. and David Indiano, Esq. sitting across the table from me. I was not then informed nor have I ever been informed by the PSC or otherwise of the relationships described in this statement.

5. During the last week, I was informed that William Graffam, Esq. had sat at counsel table for the PSC during parts or all of the opening statements and had expressed that this firm had a financial interest in the case, presumable for attorney's fees. I heard then that there is a third Graffam brother who is also an attorney and who works with Charles Cordero, Esq. I do not know this third Graffam brother. I also was informed then that Vilma Vilá, Esq., is the sister of Raúl Vilá, Esq, a partner of the Fiddler, González & Rodríguez law firm, who represent the San Juan Dupont Plaza Corporation in this case. I did not know of this relationship previously.

6. Because the law clerks who participate actively with the Court in this very litigation have brothers who have a direct and significant financial or professional interest in the outcome of this litigation, and the absence of any disclosure on the record of these facts, the impartiality of those involved might reasonably be questioned in this case.

I declare under penalty of perjury that the foregoing is true and correct, pursuant to 28 U.S.C. Sec. 1746.

In San Juan, Puerto Rico, this 10th day of August, 1989.

/s/ Eric A. Tulla
ERIC A. TULLA

COUNSEL FOR ALLIED-SIGNAL INC., AMOCO FABRICS & FIBERS COMPANY, BASF CORPORATION, THE DOW CHEMICAL COMPANY, E. I. DU PONT DE NEMOURS & COMPANY, THE FIRESTONE TIRE & RUBBER COMPANY, H. B. FULLER COMPANY, H. B. FULLER COMPANY PUERTO RICO, FUTURE FOAM, INC., THE GOODYEAR TIRE & RUBBER COMPANY, KNOLL INTERNATIONAL HOLDINGS, INC. (includes GENERAL FELT INDUSTRIES and SCOTFOAM CORPORATION), OLIN CORPORATION, PPG INDUSTRIES, INC., QUANTUM CHEMICAL CORPORATION (USI DIVISION), SEALED AIR CORPORATION, UNION CARBIDE CORPORATION, and UNIROYAL PLASTICS COMPANY, INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Master File MDL-721

IN RE: SAN JUAN DUPONT PLAZA HOTEL FIRE LITIGATION

THIS DOCUMENT RELATES TO: "ALL CASES"

DECLARATION OF VICTOR B. MADDOX

Declarant, VICTOR B. MADDOX, being of legal age, single, and a resident of Louisville, Kentucky, being first duly sworn, states:

1. I am a partner in the Louisville, Kentucky law firm of Brown Todd & Heyburn and serve as counsel for each of the above-listed defendants.

2. During the first phase of trial in this litigation, the "Corporate Veil" trial, which began on March 15, 1989, and extended into May, 1989, I served as co-lead counsel for a group of defendants participating in the first phase of trial as third party plaintiffs.

3. Throughout my participation as co-lead counsel for the third party plaintiffs in that phase of trial, I worked actively with representatives of the Plaintiffs Steering Committee to coordinate our client's claims and the presentation of proof with the plaintiffs. In that capacity, I worked with Messrs. David Indiano, Wendell Gauthier, Harvey Nachman, and Francisco Troncoso, among others. Throughout February, March, April and into May, 1989, I had frequent meetings, conferences and conversations with these individuals, including Mr. Indiano. During the corporate veil phase of trial, I often sat at counsels' table with Mr. Indiano or at seats in the courtroom designated for plaintiffs' and third party plaintiffs' counsel.

4. During the corporate veil trial, I met for the first time Mr. Richard Graffam, who I understood to be a law clerk for Judge Raymond L. Acosta. At that time, it was my understanding that Mr. Graffam was not regularly assigned to MDL-721. Until the onset of the second phase of trial, however, I have observed that Mr. Richard attends the proceedings on a regular basis.

5. At no time during the corporate veil phase of trial, when I served as co-lead counsel for the third party plaintiffs, or at any other time during this litigation, did Mr. David Indiano, any other representative of the Plaintiffs' Steering Committee, or any representative of the Court advise me of the familial relationship between Mr. Richard Graffam and Mr. Indiano's law partner, Mr. William Graffam.

6. I was unaware of the familial relationship between Mr. Richard Graffam, and Mr. Indiano's law partner, Mr. William Graffam, until it was made known to me by counsel for other defendants on July 20 and 21, 1989. I was advised at that time that in addition to the familial relationship between the Graffams, and Mr. Indiano, the economic relationship between Mr. Indiano and Mr. William Graffam, Mr. William Graffam has appeared in Court during this trial on behalf of the PSC.

I declare under penalty of perjury that the foregoing is true and correct, pursuant to 28 U.S.C. Sec. 1746.

In San Juan, Puerto Rico, this 11th day of August, 1989.

/s/ Victor B. Maddox
VICTOR B. MADDOX

COUNSEL FOR: ACONI CONSTRUCTORS, INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Master File MDL No. 721

IN RE: SAN JUAN DUPONT PLAZA HOTEL FIRE LITIGATION

SWORN STATEMENT

I Ricardo L. Rodriguez Padilla, of legal age, married, and a lawyer with residence in Guaynabo, Puerto Rico, under oath, depose and say:

1. My name and legal circumstances are as stated.

2. About 10 days ago one of the defense attorneys in the above captioned case approached me and asked if I know that Mr. Richard Graffam, a law clerk to Honorable Judge Raymond Acosta, had a brother that worked with Mr. David Indiano, a member of Plaintiffs Steering Committee.

3. This was the first time I had heard that fact even mentioned. I answered I didn't know. Immediately I started investigating this fact.

4. Once I ascertained that Mr. Graffam had a brother, that indeed may have an economic interest in the outcome of this case, I informed the defendants' liaison committee of my findings.

5. I met Mr. David Indiano for the first time in this case. I have never met Mr. Richard Graffam. I had seen him in Court before this case, but I did not even know his name.

6. I have since learned that Mr. Graffam's brother is a partner of Mr. Indiano.

7. I have observed Mr. Richard Graffam assisting the Court during the trial of this litigation.

8. At no time did the PSC, Mr. Indiano or either William or Richard Graffam disclosed these matters to me.

9. On the basis of the foregoing facts my client feels that the Court through its law clerks has placed itself in the position were its impartiality may reasonably be questioned.

In San Juan, Puerto Rico this 10 of August of 1989.

/s/ Ricardo L. Rodriguez Padilla
RICARDO L. RODRIGUEZ PADILLA

Affidavit Number 50.

Sworn and subscribed before me by Attorney Ricardo L. Rodriguez Padilla of the above mentioned personal circumstances and representing Aconi Constructors, Inc., whom I give faith of personally knowing.

/s/ [Illegible]
Notary Public

COUNSEL FOR: LAMINATING SERVICES, INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Master File MDL-721

IN RE: SAN JUAN DUPONT PLAZA HOTEL FIRE LITIGATION

THIS DOCUMENT RELATES TO: ALL CASES

AFFIDAVIT OF RICHARD J. SUAREZ

COMES NOW Richard J. Suarez, who, being duly sworn, does depose and declare under oath:

1. I am of lawful age, unmarried, an attorney-at-law, a resident of Miami, Florida, and have personal knowledge of the facts contained herein.

2. I practice law in the Federal and State Courts of Florida.

3. I had no knowledge of the family relationship of this Court's law clerk, Richard Graffam, to one of the law firms comprising the Plaintiff's Steering Committee (PSC) until recently informed by the Defense Liaison.

4. The instant case (MDL 721) has demonstrated extensive input of staff to the decision making process of the Court not only in written orders but also in court. For example, the Pretrial Conference attended by approximately 60 attorneys was conducted by a Court staff member not the Judge; the law clerk in question frequently con-

fers with the Judge in open court while a motion is being argued.

5. Even after the conflict of interest of the law clerk was brought to the attention of this Court, the law clerk remained in the courtroom, conferring with the Judge while motions were being argued by the parties.

6. In view of the foregoing appearance of impropriety which has existed throughout this trial, a mistrial and recusal is the only acceptable solution to the undersigned and to his client.

FURTHER AFFIANT SAITH NAUGHT.

/s/ Richard J. Suarez
RICHARD J. SUAREZ

SWORN TO AND SUBSCRIBED before me this [illegible] day of August, 1989 in Hato Rey, Puerto Rico.

/s/ [Illegible]
Notary Public

[SEAL]

COUNSEL FOR: MAHARAM FABRICS CORPORATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Master File MDL-721

IN RE: SAN JUAN DUPONT PLAZA HOTEL FIRE LITIGATION

THIS DOCUMENT RELATES TO: ALL CASES

AFFIDAVIT OF DAVID F. McINTOSH IN SUPPORT OF MISTRIAL AND RECUSAL

COMES NOW David F. McIntosh who, being duly sworn, does depose and declare under oath:

1. I am of lawful age, married, an attorney-at-law, a resident of Miami, Florida, and have personal knowledge of the facts contained herein.

2. I practice law in the Federal and State Courts of Florida.

3. I have never investigated conflicts of interest of the staff of Federal Judges, but have always relied upon the Court to avoid even the appearance of such evil immediately upon the Court becoming aware of such conflict.

4. Accordingly, I had no knowledge of the family relationship of this Court's law clerk, Richard Graffam, to one of the law firms comprising the Plaintiffs' Steering Committee (PSC) until recently informed by the Defense Liaison.

5. The instant case (MDL 721) has demonstrated the most extensive input of staff to the decision making process of a Court in my 29 years of being an attorney, e.g., the Pretrial Conference attended by approximately 60 attorneys was conducted by a Court staff member not the Judge; and, frequently the law clerk in question confers with the Judge in open court while a motion is being argued.

6. Even after the conflict of interest of the law clerk was brought to the attention of this Court, the law clerk remained in the courtroom, whispering in the ear of the Judge while motions were being argued by the parties.

7. In view of the foregoing disregard of the ethics of the situation, the total insensitivity of the Court to the feelings of the defendants, and the indifference to the appearance of impropriety, a mistrial and recusal is the only acceptable solution to the undersigned and to his client.

FURTHER AFFIANT SAITH NAUGHT.

/s/ David F. McIntosh
DAVID F. MCINTOSH

SWORN TO AND SUBSCRIBED before me this — day of August, 1989 in Hato Rey, Puerto Rico.

/s/ [Illegible]
Notary Public

[SEAL]

COUNSEL FOR HUFCOR, INC. and ACW AIRWALL, INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Master File MDL-721

IN RE: SAN JUAN DUPONT PLAZA HOTEL FIRE LITIGATION

THIS DOCUMENT RELATES TO: ALL CASES

AFFIDAVIT OF HECTOR MARTINEZ JIMENEZ

I, HECTOR MARTINEZ JIMENEZ, an attorney of legal age, married and a resident of Santurce, Puerto Rico, under oath deposes and says:

1. My name and legal circumstances are as stated above.

2. On or about three weeks ago I learned from another party, that Mr. Richard Graffam was related to a partner at the law firm, Jimenez, Graffam & Lausell who has a representative partner of a member of the Plaintiffs' Steering Committee.

3. Thereinafter I was able to corroborate that Mr. Graffam is a brother of Mr. William Graffam of the law firm of Jimenez, Graffam & Lausell.

4. On the basis of this fact, it is my understanding that this Honorable Court should be disqualified in these proceedings in which its impartiality might reasonably be questioned.

5. I met Mr. David Indiano for the first time in this case. I have never met Mr. Richard Graffam. I had seen

him in Court before this case, but I did not even know his name.

6. I made this statement at the request of the Defendants' Liaison Committee.

DATED this 11th day of August, 1989.

/s/ Hector Martinez Jimenez
HECTOR MARTINEZ JIMENEZ

AFF. 5158

SWORN to and subscribed before me by HECTOR MARTINEZ JIMENEZ, of the personal circumstances stated above, personally known to me, in Hato Rey, Puerto Rico on this 11th day of August, 1989.

/s/ [Illegible]
Notary Public

[SEAL]

SWORN STATEMENT

I, VICENTE SANTORI-COLL, of legal age, married, attorney-at law, and a resident of San Juan, Puerto Rico, hereby declare under oath:

That my personal circumstances are as above stated.

That I have practiced law in Puerto Rico since November, 1959.

That approximately 10 days ago it was brought to my attention for the first time that Richard Graffam, Esq., the law clerk for the Honorable Judge Raymond Acosta, was the brother of William Graffam, Esq., who is a law partner of David C. Indiano, Esq., one of the attorneys in the Plaintiffs' Steering Commitee of the San Juan Dupont Plaza Hotel Fire Litigation.

That I never knew until I was so informed approximately 10 days ago of the family relationship between attorneys Richard and William Graffam and of the fact that the law firm of William Graffam had a financial interest in the outcome of San Juan Dupont Plaza Hotel Fire Litigation.

That my knowledge of the Graffam brothers and David C. Indiano is as follows: I know Richard Graffam because of his participation as law clerk in the San Juan Dupont Plaza Hotel Fire Litigation, although I have never met him personally; William Graffam, I have never met and do not know at all; and David C. Indiano, I came to know from his participation in the San Juan Dupont Plaza Hotel Fire Litigation.

That it has become apparent throughout the court proceedings in the second phase of trial of the Dupont Plaza Hotel Fire Litigation that Mr. Richard Graffam is actively assisting the trial judge in resolving significant issues that have arisen during the course of trial.

That the above stated facts have been disclosed to my clients in this litigation and they have expressed grave

concern, instructing me to act in whatever manner I deem necessary in protection of their interest.

/s/ Vicente Santori-Coll
VICENTE SANTORI-COLL

AFFIDAVIT NO. 913

Sworn and subscribed to before me by Vicente Santori-Coll, of the personal circumstances above stated, to me personally known in San Juan, Puerto Rico, on this 10th day of August, 1989.

/s/ [Illegible]
Notary Public

[SEAL]

COUNSEL FOR ALLIED-SIGNAL INC., AMOCO FABRICS & FIBERS COMPANY, BASF CORPORATION, THE DOW CHEMICAL COMPANY, E. I. DU PONT DE NEMOURS & COMPANY, THE FIRESTONE TIRE & RUBBER COMPANY, H. B. FULLER COMPANY, H. B. FULLER COMPANY PUERTO RICO, FUTURE FOAM, INC., THE GOODYEAR TIRE & RUBBER COMPANY, KNOLL INTERNATIONAL HOLDINGS, INC. (includes GENERAL FELT INDUSTRIES and SCOTFOAM CORPORATION), OLIN CORPORATION, PPG INDUSTRIES, INC., QUANTUM CHEMICAL CORPORATION (USI DIVISION), SEALED AIR CORPORATION, UNION CARBIDE CORPORATION, and UNIROYAL PLASTICS COMPANY, INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Master File MDL-721

IN RE: SAN JUAN DUPONT PLAZA HOTEL FIRE LITIGATION

THIS DOCUMENT RELATES TO: "ALL CASES"

DECLARATION OF HECTOR MELENDEZ-CANO

Declarant, HECTOR MELENDEZ-CANO, being of legal age, married, and a resident of Puerto Rico, being first duly sworn, states:

1. I am a partner in the Hato Rey, Puerto Rico, law firm of Trias, Doval, Munoz, Acevedo & Otero. I serve as counsel for each of the above-named defendants in this litigation.

2. I have actively participated as counsel in this litigation since the beginning of the jury selection process and

since then have attended the trial and related hearings, conferences and informal gatherings of counsel on a regular basis. I have had regular opportunities to converse personally and on the telephone with various members of the Plaintiffs' Steering Committee, including Mr. David C. Indiano.

3. At no time during the pendency of this litigation did any member or representative of the Plaintiffs' Steering Committee, or any of the plaintiffs, advise me of the relationship between Mr. William Graffam of the San Juan law firm of Jimenez, Graffam & Lausell, and Mr. Richard Graffam, the law clerk to Judge Raymond L. Acosta.

4. Until a few weeks ago, I was unaware of any economic relationship between Mr. David Indiano, a member of the Plaintiffs' Steering Committee, and Mr. William Graffam, of the Jimenez, Graffam & Lausell law firm.

5. Similarly, until a few weeks ago, I was unaware of any familial relationship between Mr. William Graffam and Mr. Richard Graffam, law clerk to Judge Raymond L. Acosta.

6. At no time during the pendency of this litigation did any representative or member of the Plaintiffs' Steering Committee or any representative of the Court advise me of the relationship between Mr. Richard Graffam and Mr. William Graffam, Mr. David Indiano's law partner.

I declare under penalty of perjury that the foregoing is true and correct, pursuant to 28 U.S.C. Sec. 1746.

In San Juan, Puerto Rico, this 11th day of August, 1989.

/s/ Hector Melendez-Cano
HECTOR MELENDEZ-CANO

COUNSEL FOR SICO, INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Master File MDL-721

IN RE: SAN JUAN DUPONT PLAZA HOTEL FIRE LITIGATION

THIS DOCUMENT RELATES TO: ALL CASES

DECLARATION OF ERIK J. BLOMQVIST IN SUPPORT OF MISTRIAL AND RECUSAL

COMES NOW ERIK J. BLOMQVIST who, being duly sworn, does depose and declare under oath:

1. I am of lawful age, married, an attorney-at-law, a resident of Miami, Florida, and have personal knowledge of the facts contained herein.
2. I have practiced law in the Federal and State Courts of Florida for over 35 years.
3. I have never had any need to believe that it was necessary to inquire into the potential conflict of interest of a District Court Judge's staff or law clerk. I have always relied on the Federal Court Judges to take the sole responsibility to avoid any appearance of improprieties.
4. My first knowledge of a relationship between the Court's law clerk, Richard Graffam to one of the firms comprising the Plaintiffs' Steering Committee (PSC) was Friday, August 4, 1989, afternoon after Court recessed.
5. The instant case (MDL 721) has demonstrated the most extensive input of staff to the decision

making process of a Court in my 35 years of being an attorney, i.e., the Pretrial Conference attended by approximately 60 attorneys was conducted by a Court staff member not the Judge; and, frequently the law clerk in question confers with the Judge in open Court while a motion is being argued.

6. Even after the conflict of interest of the law clerk was brought to the attention of this Court, the law clerk remained in the courtroom, whispering in the ear of the Judge while motion were being argued by the parties.

7. In view of the foregoing matters which to me and my client give the clear perception of impropriety and I feel sure would be shared by the general public. A recusal by Judge Acosta is necessary to retain the integrity of the Federal Judicial system—that *all* parties are entitled to a fair and impartial trial.

I declare under penalty of perjury that the foregoing is true and correct, pursuant to 28 U.S.C. §1746.

In San Juan, Puerto Rico, this 14th day of August, 1989.

/s/ Erik J. Blomqvist
ERIK J. BLOMQVIST

COUNSEL FOR DEFENDANT ADT DIVERSIFIED SERVICES, INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Master File: MDL-721

IN RE: SAN JUAN DUPONT PLAZA HOTEL FIRE LITIGATION

THIS DOCUMENT RELATES TO: ALL CASES

DECLARATION OF ARTURO DIAZ

COMES NOW Arturo Díaz, of legal age, married, attorney-at-law and resident of San Juan, Puerto Rico, and hereby states under penalty of perjury as follows:

1. I am counsel for ADT Diversified Services, Inc. ("ADT") in the San Juan Dupont Fire Litigation.

2. Before the commencement of this litigation, I knew that the Court's Law Clerk, Mr. Richard Graffam, was the brother of Mr. William Graffam, a name partner in the law firm of Jimenez, Graffam & Lausell (the Graffam firm).

3. At the conference held on Monday morning, August 7, 1989, where I participated as a member of the Court appointed Defendant's Liaison Committee, I became aware that Richard Graffam, in his role as Law Clerk, has actively participated throughout the case, and has given frequent advice to the Court, as a member of the Court's team. Prior to that time I knew that Mr. Richard Graffam actively participated as a Law Clerk in

the case only after Mr. Pedro Malavet ceased in his position as Law Clerk.

4. While I knew the relationship between Mr. Richard Graffam and Mr. William Graffam and while I recently learned in a newspaper article that Mr. David Indiano was a partner of Mr. William Graffam, I never knew or suspected that either the Graffam firm or Mr. William Graffam had any financial interest, let alone a considerable one, in the outcome of the litigation, since I thought Mr. Indiano's cases were his own. Moreover, I was not aware of Richard Graffam's active participation in the case as Law Clerk.

5. During opening statements I saw Mr. William Graffam sitting in the Courtroom in the area designated for the PSC. I also observed him talking to several members of the PSC. It is my recollection that while Mr. William Graffam was sitting in the Courtroom at the PSC's designated area, Mr. Richard Graffam was also sitting in the Courtroom in the designated area for Law Clerks.

6. During a break, following Mr. William Graffam's appearance in Court, and because I became concerned about his presence in Court at the same time that his brother, Mr. Richard Graffam, was also in court performing his duties as Law Clerk, I approached Mr. William Graffam and had a conversation with him. As a result of the conversation that ensued, I became aware that both the Graffam firm and Mr. William Graffam, as a partner in the Graffam firm, were legal representatives of plaintiffs in this litigation and therefore both the Graffam firm and Mr. William Graffam had a substantial economic interest in the outcome of the litigation. Also, from my conversation with Mr. Graffam, I became aware that any fees to be received by the Graffam firm in this litigation were on a contingency basis. Immediately upon becoming aware of this situation, I informed the same to Mr. Steven Glickstein, who is also counsel for ADT in this litigation.

7. In view of the familial relationship between Richard and William Graffam, the fact that Richard Graffam has actively participated as a Law Clerk throughout this litigation, the fact that Mr. David Indiano is a partner of Mr. William Graffam, the fact that the Graffam firm and Mr. William Graffam as a partner in the firm represent plaintiffs in the case, the fact that both the Graffam firm and Mr. William Graffam have a considerable financial interest in the outcome of this litigation and the fact that such financial interest is contingent upon the final outcome, at the conference held on August 7, 1989, the Defendants' Liaison Committee, on behalf of all defendants, requested that Mr. Richard Graffam be isolated for further participation in these proceedings. Such request was taken under advisement by the Court. However, on Tuesday August 8, 1989, I was informed that Mr. Richard Graffam was still sitting in the Courtroom in the area designated for the Law Clerks and that the Court periodically conferenced with him during the proceedings.

8. In view of the foregoing, it is clear that the impartiality of the Court might reasonably be questioned and therefore a mistrial and recusal of the trial Judge is the only acceptable solution to the undersigned and its client.

I declare under penalty of perjury that the foregoing is true and correct, pursuant to 28 U.S.C. Sec. 1746.

In San Juan, Puerto Rico this 14th day of August, 1989.

/s/ Arturo Diaz
ARTURO DIAZ

APPENDIX L

SWORN STATEMENT

I, CHARLES A. CORDERO, of legal age, married, resident of San Juan, Puerto Rico do hereby swear as follows:

1. That my name and personal circumstances are those stated above.

2. I am the attorney of record in the San Juan Dupont Plaza Hotel Fire Litigation, MDL 721, representing codefendant, American International Insurance Company of Puerto Rico and the Insurance Company of the State of Pennsylvania.

3. Keith Graffam is an associate of my offices and has actively been involved in this litigation as my assistant.

4. I have been aware, since before the beginning of the litigation, that William A. Graffam is a partner of Jiménez, Graffam & Lausell and that he is the brother of both Richard Graffam, Judge Acosta's law clerk, and Keith Graffam of my office. I am also aware that David C. Indiano is William A. Graffam's partner and that the former is a member of the PSC.

5. I am the former President of the Federal Bar Association's Puerto Rico chapter and am aware that there is a relatively small number of Civil Federal Bar practitioners in San Juan Puerto Rico. Most civil practitioners who are active in the Federal Bar know each other and information among them concerning who the judge's law clerks are is common knowledge.

6. To my understanding it was common knowledge that Richard, Keith, and William are brothers and that Richard was one of the law clerks working in this litigation for Judge Acosta. This was discussed on various occasions among both local and stateside practitioners in this case.

7. Knowing all the above facts, I never felt there was any reasonable basis for believing that the impartiality

of Judge Acosta could be questioned and never considered filing any motion for recusal and or mistrial based on any of the facts described above.

In San Juan, Puerto Rico, this 15th day of August, 1989.

/s/ Charles A. Cordero
CHARLES A. CORDERO

Affidavit No. 742

SWORN AND SUBSCRIBED to and before me by Charles A. Cordero of the above stated circumstances, personally known to me in San Juan, Puerto Rico, this 15th day of August, 1989.

/s/ [Illigible]
Notary Public

[SEAL]

DECLARATION OF GARY L. BOSTWICK

I, Gary L. Bostwick, declare as follows:

1. I am an attorney at law, licensed to practice before for this Court, and a partner in the law firm of Bostwick & Ackerman, a Professional Corporation, and counsel for several defendants herein. I know the following facts of my own personal knowledge and if called and sworn as a witness could testify competently thereto.

2. I have been asked to state my recollections regarding my knowledge of the relationship of one of the law clerks of this Court to a law firm that represents plaintiffs in this matter.

3. I have a recollection of one of the attorneys representing one of the Dupont Defendants talking to me about this matter. I do not recall who the attorney was. However, I specifically remember being told that Mr. Richard Graffam, a law clerk to this Court, was the brother of an attorney with the firm of Jimenez, Graffam & Lausell. I also knew that David Indiano, a member of the Plaintiffs' Steering Committee, was a partner in that firm.

4. I recall discussing the matter for a few moments. My impression was that several attorneys representing Dupont Defendants knew of this relationship.

5. I did not find anything worthy of note about the relationship or the information. I do not recall deliberating or considering taking any action because of the information.

6. I do not have a specific recollection of the date that the information became known to me. However, it occured during one of my trips to San Juan and my best estimate is that it occurred some time between August, 1988 and February, 1989. I am certain that it occurred before Phase I of the trial began on March 15, 1989.

I declare under penalty of perjury under the laws of this United States of American that the foregoing is true and correct and was executed on August 14th, 1989 at Santa Monica, California.

/s/ Gary L. Bostwick
GARY L. BOSTWICK

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil 84-1795 (RLA)

PAN AMERICAN GRAIN, INC.,
Plaintiff

v.

M/V FREEDOM, *in rem*, her tackles, engines, boilers, etc.,
Defendants

and

INTERMAR BULKSHIPPING, INC.,
Claimant

OPINION AND ORDER

By order of the Court the following Opinion and Order is hereby entered.

On September 9, 1986, five working days before trial,[1] plaintiff filed a motion for recusal of the undersigned. Claimant filed an opposition on the same day.

Plaintiff does not allege any actual prejudice or bias nor does it question the impartiality of the undersigned.

---

[1] Although plaintiff states that its motion was not meant to delay the trial, the Court finds the lateness of said motion, given plaintiff's longstanding knowledge of several of its supporting facts, inexplicable. Whether or not this was a last-ditch effort by plaintiff to seek postponement of the trial setting or to judge shop, the Court must nonetheless independently consider the recusal motion. *See W. Clay Jackson Enterprises, Inc. v. Greyhound Leasing & Financial Corp.*, 467 F. Supp. 801 (D.P.R. 1979).

Rather, it argues that 28 U.S.C. § 455(a)[2] mandates recusal because of the supposed appearance of impropriety occasioned by the fact that a former law clerk of the undersigned is now counsel for claimant and that the brother of another attorney for claimant is at present the undersigned's only law clerk during the period his senior law clerk is on vacation.[3]

Claimant correctly points out that the undersigned's former law clerk, Katherine Theofel, did not make an appearance before this Court until more than two years after she resigned as law clerk.[4] Therefore, her participation in this case is entirely proper.

Plaintiff's other contention that because Richard Graffam is the court's only law clerk during the senior law clerk's absence as well as the brother of claimant's co-counsel, recusal is mandated in this case is equally meritless.

The Court does not accept plaintiff's claim that a law clerk must be equated with a judge in determining whether recusal is mandatory. Nor are the various cases cited by plaintiff directly applicable to the circumstances of this case. As claimant notes those cases deal primarily with future employment of present law clerks, ex parte communications by law clerks, immediate participation by former law clerks in cases pending with a judge and an attorney's family ties with a judge. None of those situations are present. Thus, continued isola-

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[2] 28 U.S.C. § 455(a) states: "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceedings in which his impartiality might reasonably be questioned."

[3] Plaintiff also mentions the fact that a third brother of attorney Graffam, counsel for claimant, was a legal assistant to the Magistrate Justo Arenas during a time that the latter was conducting discovery in this case. However, plaintiff does not make any argument related to this issue and the Court thus declines to comment further on the same.

[4] Attorney Theofel resigned on September 10, 1983 and filed a Notice of Appearance in this case on November 13, 1985.

tion of Mr. Richard Graffam would be sufficient to eliminate any question of actual impropriety. Therefore, plaintiff's arguments that 28 U.S.C. § 455(a) mandates the recusal of the undersigned in this case are dismissed as groundless.

The Court, however, is mindful of its duty to avoid even a semblance of partiality in the exercise of its functions. The rather unusual set of circumstances in this case, albeit independently not sufficient to cast any shadow of impropriety, are nonetheless, in the aggregate, sufficient to create an illusion of the possibility of some lack of fairness or justice. Therefore, after careful consideration of the possible misconceptions that might arise from the present situation, such that might lead to an appearance of impropriety in the eyes of a reasonable person, the undersigned hereby recuses himself from further participation in this case. This action is taken with great reluctance, but the dignity and integrity of the judicial process cannot be adequately protected by claimant's suggestion that the trial date be continued until the return of the senior law clerk. Thus recusal is the only reasonable alternative. This is not to say, however, that this Court is establishing any rules or limits as to future appearances by counsel herein in unrelated cases; nor that this Court is accepting all of plaintiff's arguments, let alone its comments regarding the recusal of other judges in this District. Again, the Court stresses that this decision of recusal is strictly limited to the unique circumstances of this particular case.

Accordingly, plaintiff's motion for recusal is GRANTED, not for the reasons set forth therein, but rather only for those reasons discussed above.

The trial setting is hereby vacated.

In San Juan, Puerto Rico, this 10th day of September, 1986.

RAYMOND L. ACOSTA
United States District Judge

/s/ Justo Arenas
JUSTO ARENAS
United States Magistrate

APPENDIX N

28 U.S.C. § 455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however, small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a de-

positor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the procedeing a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

Supreme Court, U.S.
FILED
MAY 4 1990
JOSEPH F. SPANIOL, CLERK

No. 89-1472

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ACW AIRWALL, INC., *et al.*,

Petitioners,

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals was correct in holding that Judge Acosta, who has presided for more than three years over this highly complex mass disaster action in which a large portion of the 500 members of Puerto Rico's federal bar have participated, did not abuse his discretion under 28 U.S.C. § 455(a) by deciding that the unique circumstances of this case did not create an appearance of partiality on the Judge's part?

2. Whether the court of appeals was correct in deciding that Judge Acosta did not abuse his discretion under Section 455(a) in declining to treat his law clerks' family relationships as if they were his own and in concluding that those relationships, standing alone, did not create the appearance of the Judge's partiality that is required by the statute's language?

3. Whether the court of appeals was correct in deciding that Judge Acosta did not abuse his discretion when he held that Petitioners' motion for recusal was untimely because "the district court reasonably believed that the parties, certainly by the time of the Phase Two Trial, were aware, or should have been aware, of the relationship involved"?

4. Whether the court of appeals was correct in deciding that Judge Acosta did not abuse his discretion in applying this Court's standard under Section 455(a) by declining to impose the draconian remedies of disqualification and mistrial?

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Plaintiffs' Steering Committee (PSC), appointed to represent the interests of all Plaintiffs in the San Juan Dupont Plaza Hotel Fire Litigation (the real parties in interest herein), opposes the Petition for a Writ of *Certiorari* to the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The Opinions of the United States Court of Appeals for the First Circuit denying the petitions for writ of mandamus are reported at 891 F.2d 967 (1st Cir. 1989) and 891 F.2d 974 (1st Cir. 1989), and appear at Pet.App. 1a-13a and 14a-18a, respectively. The Petition appears to challenge only the Opinion ap-

pearing at 891 F.2d 967, which upheld Order No. 218 of the United States District Court for the District of Puerto Rico, In the Matter of the Motion Requesting Recusal, which appears at Pet.App. 29a-57a.

STATUTE INVOLVED

This case involves 28 U.S.C. § 455(a) (hereinafter "Section 455(a)"), which is reproduced in its entirety at Pet.App. 120a-121a.

STATEMENT OF THE CASE

The San Juan Dupont Plaza Hotel Fire Litigation[1] grows out of a devastating fire that occurred on December 31, 1986. The first fire-related lawsuit was filed five days later and was assigned to District Judge Raymond L. Acosta. Subsequently, cases filed in California, Connecticut, New Jersey, and New York were transferred to the District of Puerto Rico by the Judicial Panel for Multidistrict Litigation. From the outset, Judge Acosta managed the case firmly, pressing all parties to keep to the straight and narrow goal of bringing this litigation to a swift and just conclusion.

A. The Law Clerks' Family Relationships

After Judge Acosta had presided over this litigation for more than two years, Petitioners alleged that certain family relationships between Judge Acosta's two law clerks and members of the Puerto Rican federal bar created an "appearance of partiality" attributable to Judge Acosta requiring his disqualification under Section 455(a). These relationships were:

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[1] *In re San Juan Dupont Plaza Hotel Fire Litigation*, MDL-721.

(1) David Indiano, a member of the PSC, is now a partner of William Graffam in the firm of Jimenez, Graffam & Lausell. The latter is the brother of Richard Graffam, one of Judge Acosta's law clerks at the time Petitioners moved to disqualify the Judge.

(2) Raul Vila, a partner in the firm of Fiddler, Gonzalez & Rodriguez, local counsel for Defendant San Juan Dupont Plaza Corporation, is the brother of Vilma Vila, also one of Judge Acosta's law clerks.

Petitioners contended that these relationships, *standing alone*, required Judge Acosta to disqualify himself and declare a mistrial.[2]

Judge Acosta has never attempted to keep the identity of his clerks a secret.[3] In fact, the clerks attended status conferences convened every month during the

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[2] The following relevant relationships also exist:

(1) Keith Graffam, brother of William and Richard, is a member of the firm that represents the insurers of the San Juan Dupont Plaza Hotel.

(2) Until April 1988, Vilma Vila's husband, Doel Quiñones, was an associate at the firm that represents three defendants.

Petitioners do not mention these relationships because they negate the assertion that Judge Acosta was inclined to favor any one side in this action or that there was any reasonable appearance that he might do so.

[3] Until July 30, 1989, his law clerks were Pedro Malavet, Richard Graffam and Vilma Vila. In July 1989, Pedro Malavet left to pursue private practice and a new clerk was hired to take his place. Richard Graffam also left to pursue private practice in October 1989. Vilma Vila is still employed by the district court.

litigation's pretrial stages. As a result, the clerks were well known to all counsel. Indeed, the names of the clerks were prominently mentioned in national and local news articles.

B. Counsel Involved in This Litigation

Most of the defendants retained counsel from the continental United States, who in turn became associated with local co-counsel in Puerto Rico. There are approximately sixty-three Puerto Rican lawyers and fifty-one Puerto Rican law firms representing defendants in the litigation. Of the twenty largest law firms in Puerto Rico,[4] twelve are involved in this lawsuit. Ten law firms from the continental United States have opened offices in Puerto Rico because of the magnitude of this case.

Defense attorneys banded together early on and have actively cooperated with one another from the beginning. A joint and cooperative working relationship established just days before the one-year statute of limitations expired on December 31, 1987, continues to this day. At the behest of their respective insurance companies, defendants established the Center for Public Resources for the stated purpose of fostering joint cooperation in defending against the claims. On December 9, 1987, defendants entered into an agreement entitled the Dupont Plaza Cooperation Agreement to carry out their joint defense and have been governed by it throughout this litigation. On May 8, 1989, approximately thirty-nine defendants en-

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[4] Only five law firms in Puerto Rico have over twenty-five attorneys; among the twenty largest law firms in Puerto Rico are firms with only eight or nine attorneys. Source: *Caribbean Business*.

tered into an agreement entitled the Joint Defense and Judgment/Settlement Sharing Agreement.[5] Local co-counsel are part of this cooperative effort and have participated actively and intimately in all phases of this dispute.

In January 1987, the district court appointed the Interim PSC. David Indiano was a member of that committee. At that time, he was an associate with Jimenez, Graffam & Lausell. Raul Vila's firm, Fiddler, Gonzalez & Rodriguez, also entered its appearance as counsel for the San Juan Dupont Plaza Corporation in January 1987. Shortly thereafter, the court requested applications for appointment to the permanent PSC. On February 19, 1987, Jimenez, Graffam & Lausell[6] nominated three members of the firm: Steve Lausell, William Graffam, and David Indiano. David Indiano was appointed to the permanent committee in Pretrial Order No. 2, filed on March 18, 1987. The appointment process was completely open. All parties were fully apprised of the court's deliberations and the applications, resumés, and pleadings are part of the record.

Most, if not all, of the Puerto Rican firms retained by stateside counsel to serve as local co-counsel frequently practice before Judge Acosta and the other district court judges in Puerto Rico. The federal bar in Puerto Rico is very small, and it is common knowledge that William Graffam is a partner in Jimenez, Graffam & Lausell and that Raul Vila is a partner in Fiddler, Gonzalez & Rodriguez. Three defense attorneys stated in their affidavits that they were

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[5] This agreement was voided in Pretrial Order No. 221.

[6] The application was signed by William Graffam.

aware of the sibling relationships of Judge Acosta's clerks early in this litigation.[7]

In Pretrial Order No. 29, filed on January 14, 1988, David Indiano was also appointed to the Discovery Committee, which consisted of attorneys representing both plaintiffs and defendants. Once again, the district court's application and selection process was completely open. Members of the Discovery Committee worked very closely with one another from January to December 1988. David Indiano communicated with committee members on Jimenez, Graffam & Lausell stationery. William Graffam's name appears second on that firm's letterhead.[8] In addition, David Indiano's address on the service list for this litigation always has been that of Jimenez, Graffam & Lausell.

C. The Phase One and Phase Two Trials

In March 1989, the Phase One Trial, commonly known as the "corporate veil" trial, began. It pitted the PSC and third-party plaintiffs ("TPP") against the hotel family defendants. The PSC and the TPP jointly prosecuted the case against the hotel owner-

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[7] *See* Opposition Appendix, pp. 1a-7a, Affidavits of Arturo Diaz, Gary Bostwick and Charles Cordero, which were attached as exhibits to the PSC's Opposition to Defendants' Motion for Disqualification, Recusal and Mistrial. Arturo Diaz is a member of the Trial Defense Liaison Committee and represents ADT; Gary Bostwick was principal defense attorney for the hotel ownership interests during the Phase One Trial; Charles Cordero, former president of the Puerto Rico Federal Bar Association, represents the San Juan Dupont Plaza Hotel's two insurance companies and employs Keith Graffam.

[8] Only three members of the Puerto Rican federal bar are named Graffam—the brothers Richard, William, and Keith. Theirs is apparently the only Graffam family on Puerto Rico.

ship defendants. The TPP consisted of the majority of the defendants who are now adverse to the PSC in the Phase Two Trial, some of whom signed the mandamus Petition.

During the Phase One Trial, the TPP members had daily contact with David Indiano and the other PSC members. Richard Graffam and Vilma Vila made regular appearances in court and sat at a specially designated table with a sign reading "Law Clerks" facing the attorneys in the courtroom's well. Voir dire lasted five days, during which the names of the law clerks were mentioned to each panel of venire persons an average of three to five times a day.[9] The Phase One Trial ended when settlement negotiations proved successful. Because of the settlement, allegiances immediately shifted and the TPP reverted to their original status as adversaries of the PSC.

The Court appointed a Defense Trial Liaison Committee to coordinate defense efforts and share all relevant information in the Phase Two Trial,[10] which began on June 27, 1989. Voir dire lasted seven days, during which the names of the law clerks again were mentioned to each panel of venire persons an average of three to five times a day.[11] Opening statements were presented from July 10 to July 14, 1989.

D. The Relevant Proceedings Below

Despite the passage of more than two years and the availability of full information, members of the Defense Trial Liaison Committee did not express any

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[9] Order No. 218 at 30 [Pet.App. 52a], n. 29.

[10] Pretrial Order Nos. 180 and 185.

[11] Order No. 218 at 30, n. 29.

concerns about Judge Acosta's law clerks until August 7, 1989. Petitioners filed their Motion for Disqualification, Recusal and Mistrial on August 14, 1989. Judge Acosta denied it on August 24, 1989. Six days later Petitioners filed a petition for a writ of mandamus with the United States Court of Appeals for the First Circuit which, following full briefing and oral argument, denied it on December 20, 1989 "for two separate, independent sets of reasons."[12]

REASONS WHY THE WRIT SHOULD NOT ISSUE

INTRODUCTION

As part of their ongoing attempt to derail the adjudication of this complex, mass disaster action, Petitioners ask this Court to conduct a third review of their recusal motion, claiming that both the district court and the court of appeals abused their discretion. Finding it impossible to present any recurring issues that are unsettled or otherwise "call for an exercise of this Court's power of supervision,"[13] Petitioners in effect ask the Court to function merely as a "super court of appeals," using its resources to do nothing more than scrutinize anew facts and circumstances that four federal judges unanimously found to be insufficient to compel recusal. They continue to contend that Judge Acosta abused his discretion by not immediately disqualifying himself under Section 455(a) and declaring a mistrial because of his law clerks' sibling relationships, and that the First Circuit abused its discretion in failing to reverse him on mandamus.

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[12] First Circuit's Opinion, Pet.App. 8a.

[13] Rule 10(a) and (c), Revised Rules of the Supreme Court of the United States.

They do this even though the court of appeals spelled out in painstaking detail the numerous reasons why it found Judge Acosta's decision to be " 'a rational conclusion supported by reasonable reading of the record.' "[14]

None of the purposes for which this Court ordinarily grants certiorari would be furthered by this case. The court of appeals' denial of Petitioners' mandamus petition conforms with both the letter and spirit of the only federal statute involved, Section 455(a). Moreover, notwithstanding Petitioners' strained attempt to fabricate an incongruity between the decision below and *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S.Ct. 2194 (1988), the First Circuit's carefully circumscribed opinion is perfectly consistent with this Court's pronouncement.

Furthermore, inasmuch as this case is entirely dependent upon the coincidence of a number of highly specific, interdependent facts that are unlikely to recur in the same, or any remotely similar, combination, the decision below is not likely to have any precedential impact in other Section 455(a) cases, making review by this Court inappropriate. And, even apart from its factual peculiarity, the disqualification issues present in this case—in contrast, for example, to the recusal issue raised in *Liljeberg*—do not present any unsettled legal questions that might arise with any frequency under Section 455(a). Finally, despite Petitioners' half-hearted reference to the decision below being "at odds" with other circuit court decisions (Pet. 12), there is absolutely no discernible conflict

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[14] Pet.App. 5a, quoting *In re United States*, 666 F.2d 690, 695 (1st Cir. 1981); emphasis omitted.

among the circuits on any matter relevant to this case or, for that matter, any evidence whatsoever that the federal courts are experiencing any difficulty in administering Section 455(a) in any regard germane to this case.

I. THE FIRST CIRCUIT'S DENIAL OF PETITIONERS' MANDAMUS PETITION COMPORTS WITH THE LETTER AND SPIRIT OF SECTION 455(a), AS WELL AS WITH THE RULE AND REASONING OF *LILJEBERG*.

In a desperate attempt to convince the Court that this case is worthy of its attention, Petitioners pejoratively portray the decision below as a totally unprincipled, "pernicious precedent." (Pet. 14) The petition argues that this Court should review this case because the First Circuit has violated some absolute or universal ethical principle embedded in Section 455(a) that applies in all cases without regard to what their facts may be. Indeed, their claim seems to be that the court below committed reversible error by simply exercising discretion and looking at the facts and circumstances of the case before it.

Petitioners advance this startling theory without offering any supporting authority and without ever divulging what that Platonic Ideal of judicial behavior might be. Instead, they pepper their petition with verbal flourishes that denigrate the two courts below, but offer no illumination whatsoever. The reader is told that "[t]he decision below is fundamentally at odds with the standards of judicial ethics" (Pet. 7), embraces " 'situational ethics' " (Pet. 9), "rips Section 455 from its moorings" (Pet. 11), represents a "troubling . . . gloss" (Pet. 12), is "the first decision to deliberately skirt" the "ethical imperatives" set down by Congress and this Court (Pet. 15), and condones

a "knowing violation" by Judge Acosta, who they say "deliberately concealed the facts in this case" (Pet. 22 at n. 34).

In truth, this sound and fury signifies nothing of substance. The two courts below applied Section 455(a) according to its palpably discretionary character in the only plausible way they could—with reference to the facts and circumstances of the case before them. Knowing that certiorari is not likely to be granted on the basis of Petitioners' disagreement with the way four federal judges applied the facts to the statutory standard, they have chosen to assert that this Court must declare ethical "precepts" and "imperatives" that are "immutable" on all Section 455(a) motions. The Court should do no such thing. The decision below is entirely consistent with the common understanding of the application of Section 455(a) and the precedents under it and reflects a proper exercise of judicial discretion.

The First Circuit's separate and independent dispositions of the "appearance of partiality" and "proper remedy" questions are entirely consistent with the letter and spirit of the statute, and, insofar as *Liljeberg* even bears on this case, the decision below is harmonious with the rule and reasoning of that case. In fact, Judge Breyer's opinion for the court explained in great detail precisely why Judge Acosta's decision not to disqualify himself comports with *Liljeberg's* notion that " 'the administration of justice should reasonably appear to be disinterested as well as be so in fact.' "[15]

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[15] 108 S.Ct. at 2207, quoting *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 466-67, 72 S.Ct. 813, 822-23, 96 L.Ed. 1068 (1952).

A. The Asserted Appearance of Partiality

There are competing, but equal, policies ingrained in Section 455(a).

> The first and most obvious . . . is that the courts must not only be, but must seem to be, free of bias or prejudice. . . . A second and less obvious policy is that a judge once having drawn a case should not recuse himself on unsupported, irrational, or highly tenuous speculation; were he or she to do so, the price of maintaining the purity of appearance would be the power of litigants or third parties to exercise a negative veto over the assignment of judges.[16]

Moreover, although the 1974 amendments to Section 455(a) served " 'to broaden and clarify the grounds for judicial disqualification,' "[17] they did not alter the fact that the decision of a district judge to recuse or not to recuse is still largely a matter of his or her discretion.[18] As the legislative history of Section 455(a) makes clear, the issue of disqualification remains "a sensitive question of assessing all the facts and circumstances in order to determine whether the failure to disqualify was an abuse of sound judicial discretion."[19]

In *Liljeberg*, this Court affirmed that disqualification is required under Section 455(a) only if a reasonable person, informed of all the relevant facts,

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[16] *In re United States*, 666 F.2d 690, 695 (1st Cir. 1981).

[17] 108 S.Ct. at 2197, quoting 88 Stat. 1609.

[18] H.R.Rep. No. 1453, 93rd Cong., 2d Sess. 1 (1974).

[19] *Id.*

would harbor doubts about the impartiality of the judge.[20] For all of their invocations of *Liljeberg*, Petitioners have not cited a single genuine inconsistency between the rule and reasoning of that case and the manner in which the First Circuit assessed Judge Acosta's exercise of discretion on the appearance of partiality issue.[21]

In fact, the court below simply applied the "reasonable person" standard as *Liljeberg* mandates, and "assess[ed] all the facts and circumstances" as the legislative history of Section 455(a) requires. In doing so, the First Circuit carefully specified two "general factors," as well as "three special features of this

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[20] 108 S.Ct. at 2202-03.

[21] This is not surprising, since the matter decided by the court below—whether or not the relevant facts create an appearance of partiality on the judge's part—was not even before this Court in *Liljeberg*. Since both lower courts in *Liljeberg* already had agreed that Judge Collins' relationship with Loyola University definitely "gave rise to an appearance of impropriety," 108 S.Ct. at 2198, this Court had to decide only the issue of "scienter" (that is, whether the acknowledged appearance of partiality could be vitiated by Judge Collins' apparent ignorance of his actual relationship with the plaintiff) and what the appropriate remedy would be. *Id.* at 2202, 2203

This distinction highlights the incongruity of comparing this case with *Liljeberg*. *Liljeberg's* appearance-of-partiality analysis turned on whether a single fact (the judge's lack of knowledge of his actual relationship with a party) properly could obviate the violation of Section 455(a). In this case, however, the court of appeals' appearance-of-partiality equation involved no less than five specifically delineated factors, all of which—unlike Judge Collins' undisclosed state of mind—are " 'objectively ascertainable' " by a knowledgeable observer. *Id.* at 2202.

case,"[22] which, in its view, "militate against our finding an appearance of partiality that requires disqualification."[23]

The first general factor deemed significant by the court of appeals is that, even in an ordinary case, a law clerk's family relationship is a "relatively weak and remote" basis for concluding that the judge is incapable of maintaining his own impartiality.[24] Section 455(a) addresses " 'judge[s]' . . . not clerks," and "[b]oth bench and bar . . . recognize that judges, not law clerks, make decisions."[25] The court quite properly held that it is neither necessary nor desirable for judges to recuse themselves automatically under Section 455(a) because of matters relating entirely to their law clerks or other staff members. If judges were required to treat their law clerks' family relationships as they would treat their own, the court noted, the present system in which "individual judges . . . enjoy considerable independence in deciding precisely how to use their clerks" would have been sacrificed in favor of a system in which judges would be forced "to find and deal in advance with all 'suspect' relationships of staff and parties . . . ."[26]

The First Circuit properly eschewed wholesale, indiscriminate application of Section 455 to law clerks'

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[22] Petitioners' suggestion that the court of appeals decided the "appearance of partiality" question based "on an analysis of three factors" clearly mischaracterizes the court's opinion. Pet.App. 8a.

[23] *Id.*

[24] *Id.* at 7a.

[25] *Id.* at 7a-8a.

[26] *Id.* at 8a.

family relationships, choosing instead to tailor its narrow pronouncements to the law clerks' family relationships in this case. Given the unique situation that the First Circuit faced, it would have been a gross overreaction for the court below to have used the situation involving Graffam and Vila as a pretext for " 'bureaucratizing' the law clerk system," including the necessary concomitant of expanding all present judicial disclosure procedures to encompass the family and financial relationships of the estimated 2200 law clerks currently serving in the federal court system.[27] Petitioners' insistence that this Court do so (Pet. 19) must be rejected.

The second general factor found to militate against finding an appearance of partiality in this situation is that it is a "large, complex, and time consuming" case.[28] Contrary to Petitioners' disingenuous statement that the court of appeals "decided that rules of judicial propriety can vary from case to case" (Pet. 9), the First Circuit did not simplistically adopt a separate, less stringent "appearance of partiality" standard for complex cases. Its reference to size and complexity was meant only as an acknowledgement that, in a case like this, an appellate court should be cautious about second-guessing a district judge's decision on how best to use law clerks, given "the need for judicial management by the district court."[29] This common sense proposition certainly is in no way contrary to *Liljeberg*, which discussed the complexity of litigation not in terms of the reasonable person's per-

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[27] Source: Administrative Office of the Courts.

[28] Pet.App 8a.

[29] *Id.*

ception of partiality, but in terms of the "unique difficulties" that judges often have, but must overcome, in discovering "any personal or fiduciary financial interest *they* may have in cases over which they preside."[30]

Also purely a matter of common sense is the First Circuit's reference to this litigation's location as a special feature that would lead a reasonable, informed observer to reject the notion that the judge appeared to be partial. Again, Petitioners would have the Court believe that the First Circuit was manufacturing a test that allowed a judge "to alter his ethical standards" (Pet. 14) for judging appearances of partiality based simply on geography. That is a gross distortion of Judge Breyer's reasoning. To the contrary, the court of appeals' reference to the location of this action illustrates how closely linked the court's analysis is to the "reasonable person" standard approved in *Liljeberg*.

Obviously the hypothetical reasonable person must have some level of information, the power to reason, and the ability to use common sense, although Petitioners' model is a person who knows nothing, cannot reason, and totally lacks common sense! The First Circuit quite properly recognized that "the more common a potentially biasing circumstance and the less easily avoidable it seems, the less that circumstance will appear to a knowledgeable observer as a sign of partiality."[31] Having said that, the court noted that "the federal bar in Puerto Rico is small; fewer than 500 lawyers practice in the federal district

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[30] 108 S.Ct. at 2203, n. 9; emphasis added.

[31] Pet.App. 8a-9a.

court."[32] Next, the First Circuit observed that "[t]he number of Puerto Rican lawyers involved in this case is large."[33] These premises led the court to the common sense conclusion that "[t]he risk that a law clerk, or some other staff member, will have a brother or sister or some other family member involved in this case is a likely concomitant of trying such a large case in such a small district."[34] This analysis is certainly fair comment for an appellate tribunal considering a mandamus petition alleging an abuse of discretion. Far from chiseling out insidious principles that undermine *Liljeberg*, such as the "situational ethics" that Petitioners pejoratively accuse the First Circuit of adopting, these observations simply aid the appellate court in appraising the rationality of the district court's conclusion about what a reasonable person would think.

Toward the same end, the First Circuit noted that "the effective management of this highly complex litigation benefited from, if it did not absolutely require, the services of the particular law clerks in question."[35] Again, Petitioners see this as setting a dangerous precedent:

> Under the First Circuit's test, the scope of Section 455 would be dictated by an assessment of the desirability of the judge's stated objectives, not the means by which he attempted to achieve that end. That approach would turn Section 455 on its head. (Pet. 15)

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[32] *Id.* at 9a.

[33] *Id.*

[34] *Id.*

[35] *Id.*

What their ominous spectre ignores is that the First Circuit's observation as to Judge Acosta's "need" for these law clerks was based on their unique status as "career clerks."[36] That status logically carried with it twin benefits: (1) they had extensive experience working for Judge Acosta and (2) there was more than the usual insulation from the potentially biasing influence of possible past or future employment with any of the law firms involved. Viewed in context, the First Circuit's observation that Judge Acosta's need for these particular law clerks "was somewhat special and likely to have been seen as such"[37] is proper commentary. It is not—as Petitioners depict it—a broad pronouncement that in Section 455(a) cases the end justifies the means. Moreover, the remark is so closely linked to a special fact of this case—the clerks' career status—that it is difficult to imagine any other court applying it so broadly and carelessly that there is any substance to Petitioners' assertion that it "would turn Section 455 on its head."

Not surprisingly, Petitioners ignore the last special feature of this case identified by the First Circuit—the untimeliness of Petitioners' request for recusal under Section 455(a). Yet, this is another example of how closely linked the court's analysis is to the "reasonable person" standard approved in *Liljeberg* and how unworthy this case is of further review. The First Circuit observed:

> [T]he record suggests that the district court reasonably believed that the parties, certainly by the time of the Phase Two trial, were

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[36] *Id.*

[37] *Id.*

> aware, or should have been aware, of the relationships involved.[38]

This led the court to conclude:

> Yet, for more than two years during which Richard Graffam and Vilma Vila participated in these proceedings, no one objected. This fact suggests that, until recently, those associated with the case did not see the "sibling relationship" as carrying with it a threat to the impartiality of the proceedings; and that fact helps to support the district court's conclusion that a "knowledgeable" objective observer would not have seen in the relationship a significant indication of partiality.[39]

This observation—that, in essence, if those parties who had been involved in this case every day for two years saw nothing wrong with the sibling relationships, then a reasonable observer hardly could be expected to react differently—simply ascribes rationality to the district court's express conclusions that Petitioners' motion did not demonstrate an appearance of partiality and was untimely. Moreover, linking the movants' failure to object for more than two years to what a reasonable observer would likely conclude is consistent with *Liljeberg's* reference to the "particular importance" that would be attached to any "neglect or lack of due diligence by [the movant]."[40]

The First Circuit's careful review of these factors and its measured assessment of their import in the

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[38] *Id.* at 10a.

[39] *Id.*

[40] 108 S.Ct. at 2204, n. 11.

context of Section 455(a) belie Petitioners' suggestion that it fashioned a "pernicious precedent." Petitioners' characterization of the First Circuit's opinion as a dereliction of that court's function that lends credence to the notion "that judicial propriety can vary from case to case" is grossly misleading and a regrettable distortion of that court's work product designed to draw attention to this case. The standards set by Congress and this Court compelled the court below to focus on the circumstances of this case and led it to conclude that Judge Acosta had properly exercised his discretion under Section 455(a).

B. The Proper Remedy

In addition to concluding that there was no appearance of partiality, the First Circuit independently determined that Petitioners would not be entitled to retrospective relief in the form of a mistrial "even were the 'appearance of partiality' line drawn differently."[41] The reasoning employed by the court of appeals in reaching this conclusion is consistent with the remedial considerations described in *Liljeberg* and further review by this Court is unnecessary.

In *Liljeberg*, after concluding that Judge Collins' relationship with Loyola University created an appearance of partiality whether he remembered that relationship or not, this Court stated, "There need not be a draconian remedy for every violation of Section 455(a)."[42] It went on to note:

> Congress has wisely delegated to the judiciary the task of fashioning the remedies that

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[41] Pet.App. at 13a.

[42] 108 S.Ct. at 2203.

> will best serve the purpose of the legislation. In considering whether a remedy is appropriate, we do well to bear in mind that in many cases—and this is such an example—the court of appeals is in a better position to evaluate the significance of a violation than is this Court. Its judgment as to the proper remedy should thus be afforded our due consideration.[43]

The factors considered by the Court were "the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process."[44]

In the instant case, the First Circuit expressly considered each of these factors and explained precisely why they "would nonetheless prevent us from setting aside any previous judicial action."[45] Petitioners' assertion that its analysis "distorted" these factors is largely predicated on their own "distorted" reading and incomplete depiction of both *Liljeberg* and the decision below.

For example, Petitioners contend that the prospect of repeating the portion of the Phase Two Trial that preceded the recusal motion could not constitute an "injustice to the parties" that outweighed the need to relieve Petitioners of "the result of a proceeding that has been infected with an appearance of partiality." (Pet. 20) What the First Circuit actually con-

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[43] *Id.*

[44] *Id.* at 2204.

[45] Pet.App. 12a.

cluded is that, although "the loss of time and money" inherent in granting mistrial would be unjust, the greater injustice" would lie "in putting the [Phase One] settlement agreements at risk."[46] With seeming innocence Petitioners insist that they "have no standing or desire to overturn" the settlements. (Pet. 20) This response simply begs the question; if a mistrial were declared, there would be no way to prevent parties to the more than fifty settlement agreements executed thus far from seeking relief under Rule 60(b), jeopardizing everything accomplished thus far. Opening that Pandora's box at this late stage clearly would further neither the interests of justice, nor the much favored policies of settling lawsuits and achieving litigation finality.

Furthermore, in criticizing the First Circuit's assessment of "the risk that the denial of relief will produce injustice in other cases," Petitioners quote *Liljeberg* for the apparent proposition that retrospective relief should be freely granted as a way of encouraging judges or litigants in other cases " 'to more carefully examine possible grounds for disqualification and to promptly disclose them when discovered.' " (Pet. 21) What Petitioners ignore is this Court's very next statement in *Liljeberg*—retrospective relief is not appropriate when the party seeking it "did not make a timely request for relief . . . ."[47] Clearly, this is a critical difference between this case and *Liljeberg*; granting retrospective relief under these circumstances would have the undesirable effect of encouraging precisely the type of delay that has marked these proceedings. Any delay in raising potential Section

[46] *Id.* at 12a.

[47] 108 S.Ct. at 2206.

455(a) problems—whether caused by the judge's failure to disclose at an early stage of the litigation, as in *Liljeberg*, or by an aggrieved party's lack of due diligence, as in this case—must not be tolerated. To permit tardy motions seeking recusal encourages parties to defer making Section 455(a) motions until their fortunes have soured.

Struggling to find an inconsistency with *Liljeberg*, Petitioners conveniently neglect to mention a critical passage in this Court's opinion, which justified a limited deviation in that case from the normal practice of denying late requests for retrospective relief—"the entire delay is attributable to Judge Collins' inexcusable failure to disqualify himself" once he *actually* knew of facts creating an appearance of partiality.[48] Inasmuch as the First Circuit properly concluded—in a portion of the opinion not criticized by Petitioners—that Judge Acosta had a rational basis for finding them responsible for their motion's tardiness, it clearly would have been improper for the court below to apply the *Liljeberg* exception in considering the "public confidence" factor. Since the First Circuit's analysis of the question of "proper remedy" is entirely consistent with *Liljeberg*, particularly in light of that court's considerable familiarity with this case,[49]

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[48] *Id.* at 2207.

[49] *See*, e.g., *In re Recticel Foam Corporation*, 1st Cir. No. 88-1204; *In re Dupont Plaza Hotel Fire Litigation*, 1st Cir. No. 88-1961; *In re Dupont Plaza Hotel Fire Litigation*, 1st Cir. No. 88-2016; *In re Dupont Plaza Hotel Fire Litigation*, 1st Cir. No. 88-1436; *In re Dupont Plaza Hotel Fire Litigation*, 1st Cir. No. 88-2033; *In re Dupont Plaza Hotel Fire Litigation*, 1st Cir. No. 88-8029; *In re Dupont Plaza Hotel Fire Litigation*, 1st Cir. No. 88-2149; *In re Dupont Plaza Hotel Fire Litigation*, 1st Cir. No.

Petitioners have not presented any sound reason for this Court to grant further review.

II. THE CHALLENGED DECISION WILL HAVE LITTLE OR NO PRECEDENTIAL SIGNIFICANCE IN OTHER SECTION 455(a) CASES, INASMUCH AS THE RESULT REACHED BY THE FIRST CIRCUIT WAS ENTIRELY DEPENDENT UPON THE COINCIDENCE OF A NUMBER OF UNIQUE, INTERRELATED FACTS THAT ARE UNLIKELY TO RECUR IN THIS, OR ANY REMOTELY SIMILAR, COMBINATION.

To attract this Court's attention, Petitioners attempt to cloak this case with broad, dramatic principles suggesting it presents issues of great ethical import. Nothing could be further from the truth. The First Circuit's decision is entirely and expressly fact-dependent. It does not purport to set down any rules regarding Section 455(a), but rather rests exclusively on the unique facts and circumstances of the San Juan Dupont Plaza Hotel Fire Litigation. And, compounding the uniqueness of this decision, the facts on which it rests are so peculiar and so interrelated that it is difficult to imagine how it could be applied outside of its narrow context.

The San Juan Dupont Plaza Hotel Fire Litigation is among the largest cases ever litigated in American legal history, involving thousands of plaintiffs, defendants, and attorneys. It is certainly the largest, most complex case ever brought in Puerto Rico. Although Puerto Rico's population exceeds that of 24

88-2154; *In re Dupont Plaza Hotel Fire Litigation*, 1st Cir. No. 89-1072. These are among the various appeals and mandamus petitions that have been before the First Circuit during the course of this litigation.

states, its federal bar is among the smallest, if not the smallest, in the federal court system. Because membership is limited to lawyers who are fluent in written and spoken English, there are fewer than 500 members in the Puerto Rican federal bar.

In addition, there have been numerous and specific testimonials regarding which Petitioners' attorneys knew about the law clerks' family relationships and when they possessed that knowledge. Only three members of the Puerto Rican federal bar are named Graffam—the brothers Richard, William, and Keith. Indeed, there apparently is only one Graffam family on the entire island. The relationships among the Graffam brothers and, for that matter, Vilma Vila and her brother Raul were widely known within the Puerto Rican federal bar. And, both stateside and Puerto Rican defense counsel worked together intimately and exchanged information for more than two years before anyone raised the Section 455(a) issue.

The First Circuit thought a number of other facts underscored the uniqueness of this case. These include: Judge Acosta employs career law clerks and both Richard Graffam and Vilma Vila served in that capacity; the press identified Richard Graffam and Vilma Vila as Judge Acosta's law clerks; William Graffam, who is a principal in the same law firm as PSC Member David Indiano, has had little involvement in this case; and all but one of the 49 original defendants who petitioned the First Circuit were represented by local counsel, yet only six of them executed affidavits disavowing knowledge of the sibling relationships until after the Phase Two trial began.[50]

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[50] Pet.App. 10a, 13a.

The First Circuit took great care to analyze these facts from the standpoint of a reasonable observer. Since its opinion eschewed broad rules in favor of restrained, fact-dependent observations befitting the case's unique character, certiorari should not be granted.

III. THE DISQUALIFICATION ISSUE IN THIS CASE—IN CONTRAST TO THAT IN *LILJEBERG*—DOES NOT TURN ON ANY UNSETTLED LEGAL QUESTIONS THAT MIGHT ARISE WITH ANY FREQUENCY UNDER SECTION 455(a).

In *Liljeberg*, this Court was able to settle an important legal question on which the disqualification issue turned—whether or not a decision under Section 455(a) depends on what the judge knew about the disqualifying fact and when he knew it. In so doing, this Court resolved the question for all Section 455(a) cases.

There is no comparable unsettled legal issue on which this case turns; nor is there any legal issue that is framed in a way that makes its resolution a meaningful part of Section 455(a) jurisprudence. In fact, this case does not turn on any single, narrowly defined issue, much less one that requires this Court's attention.

Nor is there any evidence of difficulties arising from relationships between judicial clerks and third persons that bear on the policies reflected in Section 455(a). Congress has not seen fit to legislate on the subject, cases are virtually nonexistent, and Petitioners do not cite anything worthy of note. Moreover, as Judge Breyer observed in his opinion for the court below:

> [J]udges are fully capable * * * of taking account of whatever "bias" having a brother

> in a plaintiff's law firm might bring to a clerk. Furthermore, individual judges must enjoy considerable independence in deciding precisely how to use their law clerks, for "bureaucratizing" the law clerk system with too many rules and regulations or too much appellate court supervision would threaten the flexibility that permits that system to speed the resolution of cases.[51]

Despite Petitioners' rhetoric and repeated ethical incantations, there does not appear to be any problem that justifies the grant of certiorari in this entirely fact-dependent case. Should the Court believe that the relationships between clerks and third persons and their relevance to federal judges warrants further attention, reference to Congress or to the appropriate Advisory Committees of the Judicial Conference for comprehensive study and possible rulemaking proposals would make far more sense than highly interstitial attention by this Court in a non-replicable case like this one.

In the final analysis, Petitioners' quarrel with the decision below is not really with any *rule* promulgated by the First Circuit, because it did not say anything that even purports to be a rule; rather, their quarrel is with the result reached by that court through careful consideration of factors and by following a process that already has been approved by this Court. That is not enough to warrant certiorari.

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[51] *Id.* at 8a.

IV. DESPITE PETITIONERS' HALF-HEARTED ALLUSION TO SOME CONFLICT AMONG THE CIRCUITS, THERE IS NONE REGARDING ANY MATTER HAVING ANY RELEVANCE TO THIS DECISION.

Only once in their petition do Petitioners even hint that this Court should review this case in order to resolve a conflict among the circuits. They do it by obliquely implying that the First Circuit is "at odds" with "other circuit court decisions" (Pet. 12) in even considering size and complexity as relevant factors under Section 455. The only case they cite—*In re Cement Antitrust Litigation*[52]—is patently distinguishable. It arose under Section 455(b), which mandates automatic disqualification according to a fixed formula; Section 455(a) is purely discretionary, and involves consideration of any factor that might be deemed significant by a knowledgeable observer.

Not only is the First Circuit's decision not inconsistent with any other relevant court of appeals opinion, it is actually in accord with every other appellate decision that bears on the remedy issue, namely *Liberty Lobby, Inc. v. Dow Jones & Co., Inc.*,[53] *United States v. Murphy*,[54] and *Parker v. Connors Steel Co.*[55] Even the one case involving a law clerk in which the circumstances led to recusal after a finding of an "appearance of partiality"—*Parker v. Connors Steel*

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[52] 688 F.2d 1297 (9th Cir. 1982).

[53] 838 F.2d 1287, 1301-02 (D.C. Cir. 1988), *cert. denied*, 109 S.Ct. 75, 102 L.Ed.2d 51 (1988).

[54] 768 F.2d 1518, 1539 (7th Cir. 1985), *cert. denied*, 475 U.S. 1012, 106 S.Ct. 1188, 89 L.Ed.2d 304 (1986).

[55] 855 F.2d 1510 (11th Cir. 1988), *cert. denied*, 109 S.Ct. 2066, 104 L.Ed.2d 631 (1989).

Co.—is so readily distinguishable that Petitioners did not even bother to mention it, let alone disagree with the First Circuit's treatment of it.

CONCLUSION

For the foregoing reasons, this Court should decline to issue the requested writ of *certiorari*.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

MASTER FILE: MDL-721

IN RE:

SAN JUAN DUPONT PLAZA HOTEL FIRE LITIGATION

THIS DOCUMENT RELATES TO:

ALL CASES

DECLARATION OF ARTURO DIAZ

COMES NOW Arturo Diaz, of legal age, married, attorney-at-law and resident of San Juan, Puerto Rico, and hereby states under penalty of perjury as follows:

1. I am counsel for ADT Diversified Services, Inc. ("ADT") in the San Juan Dupont Fire Litigation.

2. Before the commencement of this litigation, I knew that the Court's Law Clerk, Mr. Richard Graffam, was the brother of Mr. William Graffam, a name partner in the law firm of Jimenez, Graffam & Lausell (the Graffam firm).

3. At the conference held on Monday morning, August 7, 1989, where I participated as a member of the Court appointed Defendant's Liaison Committee, I became aware that Richard Graffam, in his role as Law Clerk, has actively participated throughout the case, and has given fre-

quent advice to the Court, as a member of the Court's team. Prior to that time I knew that Mr. Richard Graffam actively participated as a Law Clerk in the case only after Mr. Pedro Malavet ceased in his position as Law Clerk.

4. While I knew the relationship between Mr. Richard Graffam and Mr. William Graffam and while I recently learned in a newspaper article that Mr. David Indiano was a partner of Mr. William Graffam, I never knew or suspected that either the Graffam firm or Mr. William Graffam had any financial interest, let alone a considerable one, in the outcome of the litigation, since I thought Mr. Indiano's cases were his own. Moreover, I was not aware of Richard Graffam's active participation in the case as Law Clerk.

5. During opening statements I saw Mr. William Graffam sitting in the Courtroom in the area designated for the PSC. I also observed him talking to several members of the PSC. It is my recollection that while Mr. William Graffam was sitting in the Courtroom at the PSC's designated area, Mr. Richard Graffam was also sitting in the Courtroom in the designated area for Law Clerks.

6. During a break, following Mr. William Graffam's appearance in Court, and because I became concerned about his presence in Court at the same time that his brother, Mr. Richard Graffam, was also in court performing his duties as Law Clerk, I approached Mr. William Graffam and had a conversation with him. As a result of the conversation that ensued, I became aware that both the Graffam firm and Mr. William Graffam, as a partner in the Graffam firm, were legal representatives of plaintiffs in this litigation and therefore both the Graffam firm and Mr. William Graffam had a substantial economic interest in the outcome of the litigation. Also, from my conversation with Mr. Graffam, I became aware that any fees to be received by the Graffam firm in this litigation were on a contingency basis. Immediately upon becoming aware

of this situation, I informed the same to Mr. Steven Glickstein, who is also counsel for ADT in this litigation.

7. In view of the familial relationship between Richard and William Graffam, the fact that Richard Graffam has actively participated as a Law Clerk throughout this litigation, the fact that Mr. David Indiano is a partner of Mr. William Graffam, the fact that the Graffam firm and Mr. William Graffam as a partner in the firm represent plaintiffs in the case, the fact that both the Graffam firm and Mr. William Graffam have a considerable financial interest in the outcome of this litigation and the fact that such financial interest is contingent upon the final outcome, at the conference held on August 7, 1989, the Defendants' Liaison Committee, on behalf of all defendants, requested that Mr. Richard Graffam be isolated for further participation in these proceedings. Such request was taken under advisement by the Court. However, on Tuesday August 8, 1989, I was informed that Mr. Richard Graffam was still sitting in the Courtroom in the area designated for the Law Clerks and that the Court periodically conferenced with him during the proceedings.

8. In view of the foregoing, it is clear that the impartiality of the Court might reasonably be questioned and therefore a mistrial and recusal of the trial Judge is the only acceptable solution to the undersigned and its client.

I declare under penalty of perjury that the foregoing is true and correct, pursuant to 28 U.S.C. Sec. 1746.

In San Juan, Puerto Rico this 14th day of August, 1989.

/s/ Arturo Diaz
ARTURO DIAZ

DECLARATION OF GARY L. BOSTWICK

I, Gary L. Bostwick, declare as follows:

1. I am an attorney at law, licensed to practice before for [*sic*] this Court, and a partner in the law firm of Bostwick & Ackerman, a Professional Corporation, and counsel for several defendants herein. I know the following facts of my own personal knowledge and if called and sworn as a witness could testify competently thereto.

2. I have been asked to state my recollections regarding my knowledge of the relationship of one of the law clerks of this Court to a law firm that represents plaintiffs in this matter.

3. I have a recollection of one of the attorneys representing one of the Dupont Defendants talking to me about this matter. I do not recall who the attorney was. However, I specifically remember being told that Mr. Richard Graffam, a law clerk to this Court, was the brother of an attorney with the firm of Jimenez, Graffam & Lausell. I also knew that David Indiano, a member of the Plaintiffs' Steering Committee, was a partner in that firm.

4. I recall discussing the matter for a few moments. My impression was that several attorneys representing Dupont Defendants knew of this relationship.

5. I did not find anything worthy of note about the relationship or the information. I do not recall deliberating or considering taking any action because of the information.

6. I do not have a specific recollection of the date that the information became known to me. However, it occurred during one of my trips to San Juan and my best estimate is that it occurred some time between August, 1988 and February, 1989. I am certain that it occurred before Phase I of the trial began on March 15, 1989.

I declare under penalty of perjury under the laws of this United States of American that the foregoing is true and correct and was executed on August 14th, 1989 at Santa Monica, California.

/s/ Gary L. Bostwick
Gary L. Bostwick

SWORN STATEMENT

I, CHARLES A. CORDERO, of legal age, married, resident of San Juan, Puerto Rico do hereby swear as follows:

1. That my name and personal circumstances are those stated above.

2. I am the attorney of record in the San Juan Dupont Plaza Hotel Fire Litigation, MDL 721, representing codefendant, American International Insurance Company of Puerto Rico and the Insurance Company of the State of Pennsylvania.

3. Keith Graffam is an associate of my offices and has actively been involved in this litigation as my assistant.

4. I have been aware, since before the beginning of the litigation, that William A. Graffam is a partner of Jiménez, Graffam & Lausell and that he is the brother of both Richard Graffam, Judge Acosta's law clerk, and Keith Graffam of my office. I am also aware that David C. Indiano is William A. Graffam's partner and that the former is a member of the PSC.

5. I am the former President of the Federal Bar Association, Puerto Rico chapter and am aware that there is a relatively small number of Civil Federal Bar practitioners in San Juan Puerto Rico. Most civil practitioners who are active in the Federal Bar know each other and information among them concerning who the judge's law clerks are is common knowledge.

6. To my understanding it was common knowledge that Richard, Keith, and William are brothers and that Richard was one of the law clerks working in this litigation for Judge Acosta. This was discussed on various occasions among both local and stateside practitioners in this case.

7. Knowing all the above facts, I never felt there was any reasonable basis for believing that the impartiality of

Judge Acosta could be questioned and never considered filing any motions for recusal and/or mistrial based on any of the facts described above.

In San Juan, Puerto Rico, this 15th day of August, 1989.

/s/ Charles A. Cordero
Charles A. Cordero

Affidavit No. 742.

SWORN AND SUBSCRIBED to and before me by Charles A. Cordero, of the above stated circumstances, personally known to me in San Juan, Puerto Rico, this 15th day of August, 1989.

/s/ (illegible)
NOTARY PUBLIC

SEAL: DARIO RIVERA CARRASQUILLO
ABOGADO - NOTARIO

Supreme Court, U.S.
FILED
MAY 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1472

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

ACW AIRWALL, INC., *et al.*,
Petitioners,
v.
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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REPLY BRIEF FOR PETITIONERS

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May 15, 1990

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REPLY BRIEF FOR PETITIONERS

Petitioners ACW Airwall, Inc., *et al.*, submit this reply to respondent's brief in opposition.

1. Respondent speculates that granting the relief petitioners seek might undermine the Phase One settlement agreements, because "there would be no way to prevent parties to the more than fifty settlement agreements executed thus far from seeking relief under Rule 60(b), jeopardizing everything accomplished thus far." (Opp. 22) But that hypothesis simply has no foundation. Petitioners had nothing whatsoever to do with the Phase One settlements. Rather, those settlements were entered into voluntarily by the PSC and the hotel-related defendants. Because counsel for both the PSC and the hotel have long been aware of Judge Acosta's law clerk-related con-

flicts of interest,[1] they cannot be heard to challenge their settlement agreements on any of the grounds listed in Federal Rule of Civil Procedure 60(b) or on any other basis.

2. Respondent suggests that petitioners should be deemed to have unreasonably delayed in moving for recusal because petitioners should have somehow discovered the law clerks' improper relationships with counsel long before they in fact did. (*See, e.g.*, Opp. 18-19) But Section 455(a) does not contemplate that a motion is untimely if the movant has failed to piece together stray clues of a potentially disqualifying relationship, especially where that relationship is known to, but not disclosed by, the judge and opposing counsel. And in any event, there is nothing in the record to support a charge of unreasonable delay. As the affidavits in the appendix to the petition clearly show (Pet. App. 80a-111a), petitioners did not in fact know of the conflicts until a meeting of defense counsel on or about July 20 or 21, 1989. At that meeting, defense counsel discussed what was then only a rumor that Richard Graffam, Judge Acosta's law clerk, was the brother of William Graffam, and that David C. Indiano, a member of the PSC, was a partner in William Graffam's law firm. Following investigation of this rumor, which took only eight business days, petitioners raised their concerns with Judge Acosta. Under any standard, eight business days to ensure the accuracy of information of such significance is simply not unreasonable delay.

3. The record does not support respondent's suggestion that Judge Acosta was entirely innocent in not disclosing his law clerks' conflicts of interest on the record. Both Judge Acosta and the PSC sought to mask a central fact that petitioners fortuitously discovered only after they filed their mandamus petition: in *Pan American Grain*,

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[1] *See* Sworn Statement of Charles A. Cordero (Pet. App. 112); Declaration of Gary L. Bostwick (Pet. App. 114a).

Inc. v. M/V Freedom,[2] an unreported decision handed down only months before this case began, Judge Acosta held that he was required to recuse himself because Richard Graffam, his law clerk, was the brother of counsel for defendants, William Graffam.[3] *Pan American* makes clear that Judge Acosta fully understood that relationships such as that of the Graffam brothers create an appearance of partiality. Having recently himself ruled that the very relationships here at issue create an appearance of partiality, Judge Acosta's failure to so much as disclose those relationships in this case cannot so lightly be brushed aside as "innocent."

CONCLUSION

For the foregoing reasons and the reasons set forth in the petition for a writ of *certiorari*, the Court should grant the petition.

Respectfully submitted,

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[2] No. 84-1795 (D.P.R. Sept. 19, 1986) (Pet. App. 116a).

[3] Interestingly, Harvey Nachman, a member of the PSC who signed the brief in opposition, was counsel for plaintiff seeking recusal in that case. We note that there is not even a single cite to *Pan American* in the brief in opposition.